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Supreme Court, U.S.
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No. ①

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

CHARLES E. MINES, JR.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

With but one exception, this Court has consistently determined that jury charge error is mere trial error. Moreover, the question whether of *Penry*[1] error can be amenable to a harmless-error analysis has not been squarely answered by this Court. *See Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) ("*Smith II*") (Souter, J., concurring). The lower court, however, has determined that *Penry* error — jury-charge error — is structural error. *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*), *cert. denied*, 127 S. Ct. 2974 (2007). But this Court has expressly held that a finding of constitutional error does not end the inquiry. Mindful of the principles underlying habeas review and the high costs of retrial, this Court has instructed that a harm analysis must follow. *Calderon v. Coleman*, 525 U.S. 141, 503-04 (1998) (per curiam). *See also Yates v. Evatts*, 500 U.S. 391, 402 (1991); *Rose v. Clark*, 478 U.S. 570, 586 (1986). In the instant case, the lower court, bound by its earlier — and incorrect — holding in *Nelson*, refused to consider whether the *Penry* error was harmless.

The lower court's decision gives rise to an important question:

> The court below held in *Nelson*, that *Penry* error is structural and not subject to a harmless-error analysis. Did the court of appeals erroneously refuse to consider

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[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989)("*Penry I*").

whether Mines was actually harmed by any error that occurred at sentencing?

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OPINION BELOW

The court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ on February 26, 2008. I PA I: 12 (*Mines v. Quarterman*, No. 03-11137, 2008 U.S. App. LEXIS 4251 (5th Cir. 2008)(unpublished)).[2]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before May 27, 2008.[3] Sup. Ct. R. 13.3 (West 2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

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[2] "PA" refers to the appendix to the instant petition for certiorari review, preceded by the volume number and followed by relevant page numbers. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTr" refers to the record of pleadings and documents filed during the state habeas proceedings.

[3] Ninety days from February 26, 2008 is May 26, 2008, which this year is a federal holiday. Under Supreme Court Rule 30, the filing is due the next day.

STATEMENT OF THE CASE

I. Facts of the Crime

On May 27, 1988, eighty-year-old Vivian Moreno was found dead on the bedroom floor of her home. 9 SF 29, 67-69. Alongside Vivian lay her critically injured, fifty-seven-year-old invalid daughter, Frances Moreno. 9 SF 29, 67-69, 143. Vivian's autopsy revealed that she died as a result of multiple, blunt-impact wounds to the head and extremities. 9 SF 117-18. These wounds were consistent with blows from a hammer found at the scene and blood on the hammer matched Vivian's blood. 9 SF 119, 127. Three days after the murder, Mines was arrested at a campsite in a wooded area approximately seventy-five yards behind the Moreno home. 9 SF 46-51, 73. Several items at the campsite were identified as coming from the Moreno home. 9 SF 32, 34-35, 38, 46-49. On June 2nd, a fingerprint found beneath the Morenos' closet window was positively identified as belonging to Mines. 9 SF 75, 134. After waiving his *Miranda*[4] rights, Mines confessed to police. 9 SF 76-83.

At trial, the contested issue was Mines's sanity at the time of the offense. Chief among the evidence presented by the defense was the fact that Mines was previously arrested in Ellis County for robbery in September of 1987, and he remained incarcerated until May 19, 1988, when the robbery charges against him were dismissed, and he was sent to Terrell State Hospital. 9 SF 80-81. The defense presented extensive testimony from Dr. Ricardo Schack, a psychiatrist. 9 SR 150. Schack was appointed by the trial court in the

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

spring of 1988 to examine Mines. 9 SF 155-56. Schack's first visit with Mines was April 13, 1988, at the Ellis County Jail, at which time Mines was very agitated, verbally abusive, and experiencing delusions of grandeur. 9 SF 157, 165-66. Schack conducted his assessment of Mines in the jail because the jailers recommended Mines not be removed from his cell because he was agitated. 9 SF 156. Schack met with Mines again in December of 1988 and, overall, met with him five or six times during which time Mines became less agitated but his behavior did not change significantly. 9 SF 156-57. On his last few visits, Schack attempted to converse with Mines but found it very difficult, as talking to him was like "a constant argument." 9 SF 167-68. During the spring and winter time periods, Schack believed Mines was "mentally impaired" and diagnosed him as suffering from manic depressive illness, also known as bipolar disorder. 9 SF 9 SF 161. In Schack's opinion, on the commission date of the offense, Mines was insane, *i.e.*, he was incapable of knowing his behavior was wrong. 9 SF 169-71.

In rebuttal, the State presented testimony from two psychiatrists. The first was Dr. James Grigson who specialized in forensic or legal psychiatry. 9 SF 202-03. Grigson, too, was appointed by the court to examine Mines. 9 SF 206. Grigson stated he attempted to examine Mines at the Ellis County Jail on November 15, 1988, but he refused the examination after Grigson advised him of his rights, so this jail visit lasted five minutes "at the most." 9 SF 206-07. In March of 1989, Grigson only observed Mines for approximately thirty to ninety minutes, as again Mines would not converse with him. 9 SF 207-08. Based on these two observations and his review of Mines's hospital records, Grigson concluded

Mines was "not suffering from a serious, severe mental disease or defect that would prevent him from knowing the difference between right and wrong[,]" and he saw no signs or symptoms indicating [Mines] was suffering from bipolar disorder. 9 SF 208. Grigson elaborated that he had observed persons with bipolar disorder, and stated that they are generally severely depressed or suicidal but do not engage in criminal behavior. 9 SF 209-10.

The second State's psychiatrist to testify was Dr. Quynh Nguyen, who is one of three psychiatrists at Terrell State hospital. 9 SF 218. Nguyen conducted the initial evaluation of Mines when he was brought to the hospital on May 19, 1988, pursuant to a protective custody order. 221-22. During an initial examination, Nguyen evaluates the client's behavior, mood, affect, rate of speech, and thought content. 9 SF 225-26. Nguyen stated Mines very ably described the circumstances which led to his commitment and discussed the presidential candidates, was coherent but talked "around," and denied having any suicidal or homicidal ideas or a history of mental illness or drug abuse. 9 SF 226-27. Nguyen also physically examined Mines, and found no evidence of medical illness or organic dysfunction which would cause physical or mental impairment. 9 SF 233-34. Each member of the treatment "team[5]" also evaluated Mines and determined he was not mentally ill and therefore did not recommend he be committed to the hospital. 9 SF 235-36. The diagnostic consensus of the treatment team was that Mines "had a mixed personality disorder with paranoia, passive aggressive, antisocial features." 9 SF 237-38.

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[5] The team consisted of a psychologist, a nurse, a social worker, and a rehabilitation coordinator. 9 SF 224.

Nguyen stated that a personality disorder was not the same as a mental disease or defect, with the difference being that a person with a personality disorder is able to know right from wrong, make his own judgments, and is responsible for his own actions. 9 SF 238.

II. The Punishment Trial

A. The evidence admitted

During the punishment phase of trial, the State introduced into evidence copies of Mines's "pen packets," listing a series of violent offenses for which Mines had been convicted in North Carolina and Virginia. 9 SF 277-79. Specifically, the evidence showed that Mines had prior convictions for felonious assault and unlawful wounding in Virginia, as well as convictions for assault by pointing a gun, communicating threats, and felonious breaking or entering in North Carolina. SX 38, 39. The State then recalled Dr. Grigson, who testified as to Mines's sanity during the guilt-innocence phase, and posed a hypothetical question whether a person in Mines's circumstances – that is, a person with the six convictions described in the pen packets, carrying a diagnosis of antisocial personality, and having committed the instant offense – would probably commit continuing acts of violence that would constitute a threat to society. 9 SF 281-82. Dr. Grigson stated that in his opinion such a person "will commit future acts of violence and does represent a total threat to society." 9 SF 282.

In response, Mines recalled Dr. Schack, who testified that proper treatment for bipolar disorder would reduce the odds that Mines would commit future acts of violence. 9 SF 286-87.

B. The jury charge

Pursuant to state law, Mines's jury was charged with answering two special issue questions:

> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, that caused the death of the deceased, Vivian Moreno, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Charles E. Mines, Jr. AKA Charles Anderson, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, in killing Vivian Moreno, the deceased, unreasonable in response to the provocation, if any, by the deceased?

Tr 114-15; *see* Tex. Code Crim. Proc. Ann. Art. 37.071. The trial court also gave the following instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to

> determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

Tr 114.

III. Direct Appeal and Postconviction Proceedings

Mines's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on October 14, 1992, and denied rehearing on March 17, 1993. I PA II (*Mines v. State* (*Mines I*), 852 S.W.2d 941 (Tex. Crim. App. 1992)). This Court subsequently granted Mines's petition for writ of certiorari, vacated the opinion of the Court of Criminal Appeals, and remanded the case for further consideration in light of *Johnson v. Texas,* 509 U.S. 350 (1993). I PA III (*Mines v. Texas,* 510 U.S. 802 (1993)). On remand, the Court of Criminal Appeals again affirmed Mines's conviction and sentence. I PA IV (*Mines v. State (Mines II),* 888 S.W.2d 816 (Tex. Crim. App. 1994)). Mines then filed a second petition for writ of certiorari, which this Court denied. *Mines v. Texas,* 514 U.S. 1117 (1995).

Mines filed a state application for writ of habeas corpus with the trial court. SHTr at Exhibit A. The trial court recommended that Mines's application be denied. SHTr 118. The Court of Criminal Appeals subsequently ordered that the case be filed and set for submission, and ordered briefing on the issue of whether a death-sentenced inmate must be competent to assist his

counsel in filing an application for habeas corpus relief. SHTr at Order of Oct. 8, 1997. Ultimately, however, the Texas court issued a published opinion denying habeas corpus relief. II PA V (*Ex parte Mines,* 26 S.W.3d 910 (Tex. Crim. App. 2000)). Mines's petition for writ of certiorari was denied by this Court. *Mines v. Texas,* 532 U.S. 908 (2001).

Mines filed his original federal habeas petition with the court below on December 21, 2000, and filed an amended petition on April 20, 2001. 1 R 69; 3 R 669. The lower court rejected Mines's claims and denied habeas relief, first in a Magistrate's Report and Recommendation, then in the district court's order adopting the report. II PA VI (*Mines v. Cockrell,* No. 3:00-CV-2044-H (Findings, Conclusions, and Recommendation of the U.S. Magistrate Judge, May 21, 2003)); II PA VII (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Order (Aug. 6, 2003)); II PA VIII (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Judgment (Aug. 6, 2003)); *see also* 4 R 1141-91, 1245-46. The district court also denied a certificate of appealability. III PA IX (*Mines v. Cockrell,* No. 3:00-CV-2044-H, Certificate As to Appealabilty (Nov. 7, 2003)). Mines then requested a certificate of appealability to the Fifth Circuit Court of Appeals. The Fifth Circuit granted his request in part and denied in part. III PA X: 175 (*Mines v. Dretke,* 118 Fed. Appx. 806 (5th Cir. Dec. 16, 2004)). In the intervening years, the law surrounding the issues in Mines's case continued to develop until the appellate court finally granted partial relief. I PA I: 12.

REASONS FOR GRANTING THE WRIT

Constitutional error is not, and should not be, taken lightly. Even more so in the context of a death-penalty case. But this Court has never shied away from allowing harmless-error analysis in those cases, even where as here, the flaw in the instructions can be construed as creating a reasonable likelihood that the jury was precluded from considering and giving effect to the defendant's mitigating evidence.

Penry error occurs when the jury is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Yet it is highly unlikely that a jury would have found Mines's weak evidence of mental illness so sympathy-provoking as to overcome the horrific murder and attempted murder he committed. And requiring an expensive and difficult –if not impossible– retrial two decades later is fundamentally at odds with the traditional role of habeas corpus review.

In the instant case, the lower court concluded the jury was prevented from considering and giving effect to Mines's mitigating evidence of mental illness. Then bound by the holding of *Nelson* — and in clear contravention of this Court's precedents — it made no determination of harm. But as the record fairly shows, in this case, the constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

I. The Precedent of this Court Makes Clear That *Penry* Error Is Not Structural Error, Thus the Inquiry Does Not End upon the Determination That There Was a Reasonable Likelihood That the Jury Was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence.

A. With only the exception of defective reasonable-doubt instructions, this Court has unequivocally held jury-charge error to be trial error.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 207-08 (1991). The *Fulminante* Court recognized that "most constitutional errors can be harmless." *Id.* at 306. *See also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)), *see also id.* at 9.

Structural defects, on the other hand, are different and exceedingly rare. With such errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Fulminante*, 499 U.S. at 309-10. In this way, then,

structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). 4As the Court concluded in *Rose*:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuencco*, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparaza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); *Neder* (instruction omitted element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemmons v. Mississippi*, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime). *But see Sullivan* (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Mines's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider his future dangerousness and the deliberateness of his actions. Additionally, Mines's jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). This is classic jury-charge error. *See Smith II*, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That *Penry* error arises in the context of death penalty case does not transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. *E.g.*, *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to *Penry* error. But the Court has not hesitated to find these types of jury-instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new exception out of whole cloth: "moral judgements" are not subject to harmless-error review. *Nelson*, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that *Penry* error should be structural error. *Id.* *Nelson* relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the *Penry* line of cases. *Id.* at 314 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004)); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302). This absence, the court explained rests on

> the recognition that *Penry* error deprives the jury of a "vehicle for expressing its 'reasoned *moral* response' to the defendant's background, character and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry II*, 532 U.S. at 797 [] (quoting *Penry I*, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned *moral* judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this Court's determination that *Hitchcock*[6] error can be harmless. *See Singletary v. Smith*, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

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[6] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

At issue in *Hitchcock* was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" *Id.* at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. *Id.* This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 [] (1986), *Eddings v. Oklahoma*, 455 U.S. 104 [], and *Lockett v. Ohio*, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in *Hitchcock* and the Texas special issues found to be inadequate in *Penry I*, *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007), and *Brewer*.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also Abdul-Kabir*, 127 S. Ct. at 1673-674; *Smith II*, 127 S. Ct. at 1698; *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4 (1991); *Nelson*, 472 F.3d at 311. But as *Calderon* explained, even where a *Boyde* analysis has been made, a federal habeas court must go one step further:

> Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U.S. at 380 [], it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. *See, e.g., Gonzalez-Lopez*, 126 S. Ct. at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); *Sullivan*, 508 U.S. at 281-82

(denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); *Vasquez*, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to *Penry* error, no such suggestion, much less a plain statement, has ever been made despite numerous opportunities to do so. For good reason: because *Penry* error, like all other trial errors, should not require automatic reversal and is thus subject to harmless-error analysis.

II. Even If There Is *Penry* Error in this Case, the Record Does Not Support a Finding That the Error Had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Fry v. Pliler*, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting *Kotteakos*, 328 U.S. at 765). The policies underlying *Brecht*'s harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Granting relief without any evidence of actual harm violates the role of habeas corpus review: traditionally a vehicle to grant relief to those whom society has

'grievously wronged.'" *Id.* at 637. Yet, Mines has not been "grievously wronged."

The lower court's grant of relief to Mines is based on weak and incredible evidence which the panel below was foreclosed from considering based on the en banc Court's decision in *Nelson*. In fact, two juries had previously dismissed Mines's evidence of mental incapacity in both his competency hearing and during the guilt-innocence stage of trial. Although it is undoubtedly true that the jury was not able to fully consider Mines's mental illness, it does not logically follow that if the jury had that opportunity it would have spared his life. Indeed, every indication from the jury was that it did not find Mines's evidence credible or persuasive. Refusing to consider the likely actions of the jury in determining whether relief is warranted is contrary to this Court's body of law.

Further the decision to grant relief in a twenty-year-old case has significant costs. It remains to be seen whether the State can effectively retry Mines's punishment case yet again. Certainly, the societal costs of this case, particularly in the administration of justice, weigh heavily in favor of considering harm. Notably, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And this Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990); *see also McKlesky v. Zant*, 499 U.S. 467, 490 (1991) (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal

adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect or influence" on the verdict."[7] *Id.*

In the instant case, there is no doubt the instructions given to the jury were problematic under both *Penry I* and *Penry II*. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The *Fry* Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is *Penry* error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the *Penry* error in this case was harmless. *See Yates v. Evatts*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose*, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the

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[7] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless-error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

Chapman [*v. California*, 386 U.S. 18 (1967)] standard.") (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).

In considering whether *Penry* error occurred under the former Texas sentencing issues, this Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" *Johnson*, 509 U.S. at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Mines's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility assigned to jurors in a capital murder trial is serious. We cannot assume they do not take it seriously. The *Lockett* Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction, nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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No. 07-1482

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice
Correctional Institutions Division,
Petitioner,

v.

CHARLES E. MINES, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[CAPITAL CASE]

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QUESTIONS PRESENTED
(RESTATED)

CAPITAL CASE

1. Having previously directed the Texas Court of Criminal Appeals ("CCA") to reconsider its denial of relief to Respondent under *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), in light of *Johnson v. Texas*, 509 U.S. 350 (1993), should this Court now grant plenary review to address the correctness of the Court of Appeals' brief, unpublished *per curiam* opinion holding that the CCA on remand from this Court acted unreasonably in not granting *Penry* relief?

2. Should this Court accept Petitioner's invitation to decide whether *Penry* error is subject to harmless-error analysis, where Petitioner waived that issue by not raising it until the fifteenth year of state and federal litigation over Respondent's *Penry* claim, the issue concerns a statute repealed in 1991 that affects fewer than a dozen or so inmates, the type of error caused by the pre-1991 Texas statute was unique in capital sentencing, and the powerful mitigating evidence of mental disability that Respondent's jury was precluded from considering leaves no doubt that the error was harmful under any standard?

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A. This case is not an appropriate vehicle to assess whether *Penry* error can be deemed harmless because Petitioner waived this defense by failing to raise it in a timely matter. 14

B. The question presented has no jurisprudential or practical significance because it concerns a unique capital statute that was repealed almost seventeen years ago, and a vanishingly small number of inmates are currently litigating claims related to that long-abandoned statute. 17

C. The same considerations that render the issue in this case uncertworthy – the unique problems presented by the former Texas statute – also provide compelling support for the view that harmless error analysis is inappropriate to *Penry I* claims. 20

D. The strength of the mitigating evidence presented by Mr. Mines precludes a finding of harmlessness under any standard and thus counsels against use of this case as vehicle for addressing the highly-technical, statute-specific issue. 29

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PRIOR PROCEEDINGS

More than fifteen years ago, Respondent ("Mr. Mines") asserted on direct appeal his constitutional challenge to the deficiency of the former Texas "special issue" scheme as applied to his mitigating evidence of severe mental illness. His claim was rejected on the merits by the Court of Criminal Appeals of Texas ("CCA"). *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1992). This Court ordered reconsideration of Mr. Mines' case in light of *Johnson v. Texas*, 509 U.S. 350 (1993), notwithstanding the fact that it denied review in the vast majority of Texas capital cases that had been "held" pending *Johnson*. *Mines v. Texas*, 510 U.S. 802 (1993). The CCA again affirmed. *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1117 (1995).

Mr. Mines pursued his *Penry* claim on federal habeas; after the district court denied relief, the Court of Appeals granted a Certificate of Appealability on the issue. *Mines v. Dretke*, 118 Fed. Appx. 806 (5th Cir. 2004) (unpublished). After briefing and oral argument, the Court of Appeals granted relief in a short, unpublished *per curiam* opinion. *Mines v. Quarterman*, 267 Fed. Appx. 356 (5th Cir. 2008) (unpublished).

Since September 2000, when Mr. Mines initiated this action in federal district court, Petitioner has filed at least six separate federal pleadings responding to Mr. Mines' *Penry* claim.[1] Yet, Petitioner never even mentioned the words "harmless error" until the very last one – its letter brief in the Court of Appeals dated July 6, 2007.

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[1] We refer specifically to (1) Petitioner's original answer in the district court (filed June 18, 2001); (2) its opposition to Mr. Mines' motion under Fed. R. Civ. P. 59(e) in the district court (filed September 5, 2003); (3) its opposition to a Certificate of Appealability in the Court of Appeals (filed April 9, 2004); (4) its brief on the merits in the Court of Appeals (filed May 2, 2005); (5) its first supplemental letter brief in the Court of Appeals regarding Mr. Mines' *Penry* claim (filed at that court's request on April 5, 2007); and (6) its letter brief in the Court of Appeals regarding the impact on Mr. Mines' *Penry* claim of

RELEVANT FACTS[2]

i. Introduction

Petitioner makes two serious omissions in his recitation of the relevant facts. First, he attempts to minimize the significance of the mitigating evidence Mr. Mines' jury heard about his severe mental illness. *See, e.g.,* Petition for Writ of Certiorari ("Petition") at 18 (calling that evidence "weak and incredible"). Second, Petitioner fails even to mention the extent to which the record reinforces the inference that jurors could only have interpreted the former Texas sentencing statute as forbidding any broad inquiry into Mr. Mines' moral culpability. Because the correctness of the Court of Appeals' ultimate conclusion – that the CCA's rejection of Mr. Mines' *Penry I* claim on remand from this Court was objectively unreasonable – cannot be evaluated outside the context of those facts, we will examine them in somewhat greater detail.

First, however, one additional correction is in order. Petitioner asserts that "[Mr.] Mines' jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry v. Johnson*, 532 U.S. 782 (2001)." Petition at 12; *see also* Petition at 19 ("... the instructions given to [Mr. Mines'] jury were problematic under both *Penry I* and *Penry II*"). These statements are incorrect. Mr. Mines' jury was in fact seated in May 1989, about a month *before* this Court handed down its opinion in *Penry I* on June 26, 1989. *See, e.g.*, RR IX at 1 (first

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this Court's decision in *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (filed July 6, 2007). Nor did Petitioner advance any harmless-error argument respecting Mr. Mines' *Penry* claim at oral argument in the Court of Appeals on November 6, 2007.

[2] Following Texas practice, we cite the appellate record from Mr. Mines' trial as "CR" ("Clerk's Record"), and the verbatim transcript of trial testimony as "RR" ("Reporter's Record"). *See* Tex. R. App. Proc. 34.5 and 34.6.

day of trial testimony was "the 31st day of May, 1989"). Further, contrary to Petitioner's statement, no "nullification" instruction (like the one at issue in *Penry II*) was included in the penalty-phase jury charge in Mr. Mines' trial. *See* CR at 113-116 (court's charge to the jury at punishment).

ii. The powerful evidence of Mr. Mines' severe mental illness

Mr. Mines was initially arrested and jailed for aggravated robbery. On May 18, 1988, after a court-appointed psychiatrist twice found Mr. Mines incompetent to stand trial, that charge was dismissed on the State's motion. *See* CR at 9, 11; RR X at 198; Defense Exhibit 1. Mr. Mines was then committed to Terrell State Hospital (a state-run mental institution) following a court finding that he was dangerous to himself and others. RR X at 195-96, 198-99.

Mr. Mines was released from Terrell State Hospital on May 24, 1988. Three days later, not having eaten since his release, he decided to break into a house to get something to eat. RR X at 82. He knocked on the door of the home of Vivian and Frances Moreno, getting no answer. *Id.* at 81. After waiting for awhile and seeing no one about, he entered the house by climbing through a window leading into a closet in the rear bedroom. *Id.* at 42. Surprised in the bedroom by Vivian Moreno, Mines struck her repeatedly with a hammer; when Frances attempted to intervene, he assaulted her as well. *Id.* at 82. Vivian died from her injuries; Frances survived, gravely injured. *Id.* at 122, 142-45.

On May 30, 1988, police officers found Mr. Mines, with clothing and food apparently taken from the Morenos', living at a makeshift campsite in the woods just 75 yards from the crime scene. RR X at 46, 51. Mr. Mines was arrested and taken to jail.

Id. at 53. During the "book-in procedure," Mr. Mines refused to identify himself and behaved bizarrely when asked for his name. *Id.* at 74, 139. Three days later, after having repeatedly refused to sign any documents acknowledging that he understood his rights, Mr. Mines confessed. *Id.* at 80-83, 100, 105-06; State's Exhibits 1-5.

At trial, a plea of not guilty by reason of insanity was entered on Mr. Mines' behalf. RR X at 21. Psychiatrist Ricardo Schack, M.D., testified for the defense at the guilt phase. Dr. Schack testified that he had evaluated Mr. Mines several times over approximately seven months, during which period he had seen no significant changes in Mr. Mines' behavior. *Id.* at 155-160, 168. Because of Mr. Mines' consistently high level of agitation, the jailer was uncomfortable removing Mr. Mines from his cell; thus, most of Dr. Schack's interviews were conducted at cell-side. *Id.* at156.

Dr. Schack testified that he diagnosed Mr. Mines with a manic depressive illness and bipolar disorder, a severe mental disease or defect in which the brain goes into "overdrive." RR X at161, 188. He stressed that bipolar disorder is lifelong, biological and brain-based; when the illness is active, "the brain starts doing things not the way it is supposed to." *Id.* at163.[3] According to Dr. Schack, when the illness is active one's thinking "becomes irrational," as a result of which the sufferer "becomes very impulsive" and "may become violent ... [or] dangerous." *Id.* at 161-62. Individuals suffering from this illness can experience both paranoid and grandiose delusions; Mr. Mines himself told Dr. Schack that he was a very important person. *Id.* at166, 185. A person suffering from

[3] Dr. Schack contrasted Mr. Mines' physically based disorder with psychological trauma, stressing that bipolar disorder is "not due to the fact that we were spanked too hard when we were kids or something like that." *Id.*

bipolar disorder may ignore personal hygiene[4] and say things like "everybody else is crazy." *Id.* at 167. Individuals suffering from this condition, like Mr. Mines, are typically uncooperative, though their behavior patterns are variable.[5] *Id.* at 186. Indeed, when Dr. Schack first visited, Mr. Mines was "very, very hostile" towards him; Mr. Mines was "very agitated," "verbally abusive," spoke loudly, and was largely uncooperative, in effect giving only his "name, rank and serial number." *Id.* at 160, 165-67.[6] It was very difficult for Dr. Schack to converse with Mr. Mines; efforts to do so triggered a "constant argument." *Id.* at 168. Mr. Mines' judgment also appeared poor. *Id.* at 174.[7] Dr. Schack found that Mr. Mines possessed every diagnostic feature of bipolar disorder to some degree. *Id.* at192.

Dr. Schack acknowledged that bipolar disorder is changeable, cyclical, extremely variable, and can go into remission. RR X at 162, 189. Indeed, he explained that changeable behavior patterns are consistent with the nature of this disorder. *Id.* at 186, 187. Nevertheless, Dr. Schack concluded that Mr. Mines, as a result of his bipolar disorder, had been legally insane (*i.e.*, could not tell right from wrong) at the time of the offense on May 27, 1988. *Id.* at169, 170-71, 195.

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[2] Jailers complained that Mr. Mines, while awaiting trial, "stank to high heaven because he refused to bathe." RR XII at 14.

[5] Dr. Schack explained that a person so mentally ill as to be legally "insane" might nevertheless be intelligent, speak normally, be alert and aware of his surroundings, converse on a number of subjects, behave pleasantly and courteously, and generally appreciate what "is going on." RR X at 165.

[6] The last time Dr. Schack saw Mr. Mines, in the early spring of 1989, he was only "slightly less agitated." *Id.*

[7] Dr. Schack based this inference in part on Mr. Mines' comment that he did not want a lawyer and didn't "recognize" his lawyer. *Id.*

The State called James Grigson, M.D. Mr. Mines had refused to be examined by Dr. Grigson, and so Grigson's jail visit with him lasted only a couple of minutes. RR X at 213. Mr. Mines did not speak to Dr. Grigson at all. *Id.* at 207. Dr. Grigson nevertheless expressed the opinion, based on a review of Mr. Mines' records from Terrell State Hospital and what he observed during his brief encounter with Mr. Mines in the jail, that Mr. Mines did not suffer from bipolar disorder. *Id.* at 206-08. Rather, Dr. Grigson said, Mines exhibited a "mixed personality disorder." *Id.* at 211.

The State also called Dr. Quynn Nguyen, who had seen Mr. Mines at Terrell State Hospital during Mr. Mines' commitment there from May 19 through May 24, 1988. RR X at 218-224. Dr. Nguyen testified primarily from notes, having little independent recollection of Mr. Mines. *Id.* at 242. According to Dr. Nguyen's notes, Mr. Mines denied having any psychological problems and insisted he had been jailed in Ellis County for "no reason." *Id.* at 226-27, 231. Mr. Mines claimed he had been in jail because he was found to have over $1000 cash in his pocket; Mr. Mines said he usually carried large amounts of cash to help him "make a deal." *Id.* at 213.

According to Dr. Nguyen's notes, Mr. Mines gave appropriate responses on his initial interview and had no problems interacting with others at the hospital. RR X at 226-27, 229. Dr. Nguyen conceded, however, that Mr. Mines was friendly, cooperative and calm only until his views were challenged; then he became loud and argumentative. *Id.* at 234. Dr. Nguyen also noted that Mr. Mines refused a physical examination because he did not like the people at the administration center. *Id.* at 233.

Dr. Nguyen agreed with Dr. Grigson that Mr. Mines exhibited a mixed personality disorder, and noted that he was anti-social, passive-aggressive, and possibly

paranoid. RR X at 237-38. While Mr. Mines displayed "many other symptoms of different types," Dr. Nguyen concluded he did not suffer from any mental illness or medical disease. *Id.* at 238-39. On Dr. Nguyen's recommendation, Mr. Mines was released from the hospital three days before the murder. *Id.* at 241.

The jury convicted Mr. Mines of capital murder and the case proceeded to the punishment phase.

The State first introduced proof of Mr. Mines' prior convictions from Virginia and North Carolina. RR X at 277-79. It then re-called Dr. Grigson, who testified in response to a hypothetical that a person matching the facts of Mr. Mines' case would commit future acts of criminal violence. *Id.* at 282. Dr. Grigson testified that, "regardless of whether the individual [described in the hypothetical] has bipolar or heart trouble, that individual has demonstrated repeated acts of violence, and, therefore, is going to commit future acts of violence." *Id.* at 282-83.

The defense re-called Dr. Schack. Dr. Schack testified that bipolar disorder can be controlled or altered with treatment, which would reduce the odds of future acts of violence. RR X at 286. He was forced to acknowledge, however, that if untreated, Mr. Mines had a high probability of committing repeated acts of violence. *Id.* at 288.

The jury answered all three special issues "yes," requiring the trial court to impose a death sentence. RR X at 317-18; CR 113-115.

iii. Comments during jury selection and at closing argument emphasized the narrow scope of the former Texas capital sentencing statute.

During voir dire and argument, the prosecuting attorney emphasized the narrow scope of the former Texas capital sentencing statute. Respecting the former first special issue, which asked whether the defendant had killed "deliberately," the prosecutor

advised jurors that in common understanding there was little difference between "deliberately" and "intentionally," the *mens rea* for conviction of capital murder under the indictment in Mr. Mines' case. The prosecutor's exchange with juror Arnold is representative. The prosecutor explained to Arnold that "if you are like most people, you kind of shake your head and say what's the difference [between intentional and deliberate]. It's pretty much the same. And they are very similar." RR IV at 89. The prosecutor added that deliberateness "could be shown by just exactly the same evidence that showed that he committed the offense intentionally." *Id.* The juror agreed: "It's like you say, they both almost mean the same thing to me." *Id.* In response, rather than stressing whatever difference might exist between the terms, the prosecutor emphasized that little separated them: "It's very similar ... [Deliberately] is a little more than just intentionally, but it's not a great deal more...." *Id.* at 90. The prosecutor sympathetically pointed out that distinguishing intentionally and deliberately is "really exceptionally hard...." *Id.*[8]

And during closing argument at the penalty phase, the prosecutor *expressly equated* the key terms:

> On the issue[] of deliberateness, you don't have to plan and plot for a week or a day or an hour or five minutes for something to be deliberate. And the Judge hasn't instructed you [what] deliberate means. ... **But you all know what it means to do something deliberately. To form – *to form the intent to do something*.** It's not a matter of a long plot or strategy.

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[8] *See also, e.g.*, RR IV at 60 (prosecutor to juror Pipes: deliberately is "very similar" to intentionally and "we are not going to define that for you," "It's not like we are going to bring in a pile of more evidence to show you that it was deliberate that we did not show you [in] the first part of [trial, *i.e.*, the guilt phase]"); RR IV at 8 (prosecutor to juror Gentry: deliberate is "something more than ... intentional or something less than premeditation," and will be "shown with the same evidence that showed you the Defendant intentionally committed the offense").

RR X at 314 (emphases added).

The constricting effect of the pre-1991 Texas statute on the jury's ability to consider and give effect to Mr. Mines' evidence of severe mental illness was also reflected in defense counsel's penalty-phase closing argument. Defense counsel focused on Mr. Mines' bipolar disorder as the central reason for sparing Mr. Mines' life, but counsel's attempts to shoehorn the evidence into the former special issues eventually gave way to simply urging that the jury could not in good conscience sentence Mr. Mines to death – despite the fact that there was no way for the jurors, if they followed their oaths, to give effect to that conclusion. *See, e.g.*, RR X at 303 (arguing that jurors "can answer that one [the "deliberateness" issue] no"), *id.* at 300-01 ("[T]he truth of it is, and there is no way you can ever deny this, the truth is this guy is mentally ill"), *id.* at 304 ("How anybody can order the execution of a person with a mental disease or defect, so they don't know the answer to – they are not responsible for the consequences of what they do. It is completely beyond me.").[9] In response, the prosecutor vigorously reminded the jurors that they had "taken an oath to return that true verdict" and that they were obliged to do so even if "it is going to be difficult for you." RR X at 316.[10]

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[9] These arguments were remarkably similar to those at Penry's own (initial) trial. Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." *Penry I*, 492 U.S. at 325. Ultimately, however, Penry's counsel, like Mr. Mines', was reduced to simply arguing that it would be wrong to sentence someone to death who labored under such a mental disability: "[A] boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of [your] minds that there is something definitely wrong, basically, with this boy;" "[C]an you be proud to be a party to putting a man to death with that affliction?" 492 U.S. at 325.

[10] *Cf. Penry I*, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your

SUMMARY OF ARGUMENT IN REPLY

Certiorari should be denied because the question presented is unworthy of this Court's attention. *See* Sup. Ct. R. 10 ("[C]ertiorari will be granted only for compelling reasons"). First, Petitioner appears to disagree with the holding below that Mr. Mines' jury, limited under Texas' long-abandoned capital sentencing scheme to answering questions about his "deliberateness" and "future dangerousness," and whether he acted in response to "provocation," could not have given meaningful mitigating effect to evidence of his severe bipolar disorder. *See* Petition at 20 (asserting that "[t]he Eighth Amendment ... was not offended" by the preclusive effect of the former Texas statute as applied to such evidence). The question whether evidence of a capital defendant's serious mental impairment could be given meaningful mitigating effect within the scope of the pre-1991 Texas statute, however, has already been put to rest by this Court. *See Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (firmly answering that question "no"). And the Court of Appeals, with the benefit of this Court's guidance, unanimously concluded that a straightforward application of *Abdul-Kabir* to the facts of Mr. Mines' case required re-sentencing by a properly instructed jury. Indeed, the Fifth Circuit was sufficiently confident of the correctness of that legal judgment that it chose to express it in a brief, unpublished *per curiam* order.

Even if the Court of Appeals' conclusion on the merits were debatable, this sequence of events would not present a compelling case for this Court's intervention. *See* Sup. Ct. R. 10 (cautioning that "... certiorari is rarely granted when the asserted error

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emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly").

consists of ... the misapplication of a properly stated rule of law"). The fact that the Court of Appeals' conclusion is indisputably a *correct* application of *Penry* and *Abdul-Kabir*, *see infra*, simply cements the case against this Court's granting certiorari. Indeed, elsewhere in his petition *Petitioner himself* curiously acknowledges that "there is no doubt the instructions given to the jury [in Mr. Mines' case] were problematic under ... *Penry I*." Petition at 19. At a minimum, this express concession indicates that no open question remains about the application of *Penry* to the facts of Mr. Mines' case which this Court could usefully answer by granting review.

Perhaps recognizing that there is no reasonable dispute that Mr. Mines' death sentence violates *Penry*, Petitioner belatedly seeks to raise a defense of harmless error. For many reasons, this case is an inappropriate vehicle for consideration of that issue, on which Mr. Mines would prevail in any event.

First and foremost, the Court could not reach the harmless-error issue without first disposing of the separate question whether Petitioner has waived any such defense. Since his direct appeal in *1992*, Mr. Mines has continuously asserted his challenge to the inadequacy of the pre-1991 Texas special issues as applied to his evidence of severe mental illness. Notwithstanding the extensive litigation over this claim in state and federal court, Petitioner did not raise the defense of harmless error until *2007*.

Federal law clearly establishes that the State's failure to raise the issue of harmless error in a timely manner waives that defense. *See* Section A *infra*. Accordingly, Petitioner having completely failed to appropriately argue harmless error either in federal district court or in its principal brief in the Court of Appeals, this Court need not and should not address the harmless error question presented. Because

Petitioner's waiver of the harmless-error defense is dispositive of any harmless-error issue, this case is not an appropriate vehicle for addressing that question; a grant of certiorari would likely result in an opinion that did not address or resolve the question presented.

Apart from this fatal procedural obstacle, several additional considerations compel the conclusion that this case is unworthy of review. First, there is no division whatsoever among federal courts on the merits of the purported harmless-error issue. When the question whether to apply harmless error analysis to *Penry I* claims was decided by the *en banc* Court of Appeals, not a single judge among the sixteen participating dissented from the conclusion that applying harmless error analysis to *Penry* claims was inappropriate. *Nelson v. Quarterman*, 472 F.3d 287 (2006) (*en banc*), *cert. denied*, 127 S. Ct. 2974 (2007). Since *Nelson*, every *Penry* decision within the Fifth Circuit has been unanimous, including the panel decision in this case, and most – again, like the decision here – have been unpublished, suggesting at a minimum that the issue pressed by Petitioner is not provoking the kind of debate in the court below that would require this Court's intervention.

More fundamentally, the question whether *Penry* error is subject to harmless error analysis has no continuing jurisprudential significance. *Penry* error could occur only under the former Texas capital sentencing statute, which was repealed in 1991, almost seventeen years ago. Few of the inmates sentenced under the old statute remain on death row (most have been executed) and only a small fraction – probably fewer than a dozen – are presently litigating claims under *Penry*. These are not circumstances that cry out for this Court's expenditure of its limited resources.

Moreover, the old Texas statute was an extraordinary outlier in two respects: its failure to provide any general vehicle for considering a defendant's evidence of reduced culpability and its focus on a defendant's dangerousness in every case. These same unique features of the long-abandoned Texas statute also explain why harmless error analysis is inapplicable to *Penry* error: the inadequacy of the former special issues to permit consideration of a defendant's evidence as *mitigating* coupled with its strong tendency to treat such evidence as *aggravating* influenced and distorted the presentation of such evidence at trial. As the Fifth Circuit has perceptively described this effect, defense counsel "was constrained by the sentencing instructions and special issues, which narrowed the jury's focus to the issues of deliberateness and future dangerousness." *Chambers v. Quarterman*, 250 Fed. Appx. 706, 707 n.1 (5th Cir. 2007) (unpublished). Where defense counsel was thus constrained, appellate courts cannot reliably depend on the trial record to assess the impact in a particular case of the defect in the pre-1991 Texas statute, making accurate and fair harmless error review impossible. Even if a reviewing court could conceivably undertake to inquire outside the trial record to create a factual basis that would permit such analysis, the proper development of such a record in this case (*e.g.*, via a hearing in state court or federal district court) was frustrated by Petitioner's failure to assert his harmless error defense in a timely manner.

Finally, the mitigating evidence presented by Mr. Mines – his severe, lifelong, biological, brain-based mental disorder – undoubtedly bears significantly on his moral culpability for his crime. Moreover, the failure of the former Texas special issues to permit the jury to consider this evidence as reducing his culpability was exacerbated by the fact that this mitigating evidence *supported* the State's case for death by

strengthening the inference of Mr. Mines' dangerousness. Under these circumstances, the *Penry* error in Mr. Mines' case must be deemed harmful under any standard, making his case an especially inappropriate vehicle for examining that issue.

In sum, even if the Court concludes that its attention might appropriately be devoted to considering the intricate legal question whether harmless error can apply to claims under *Penry*, this is not the case to grant for those purposes. Accordingly, the Court should deny certiorari.

A. This case is not an appropriate vehicle to assess whether *Penry* error can be deemed harmless because Petitioner waived this defense by failing to raise it in a timely matter.

In asking this Court to grant review, Petitioner offers no explanation for his failure to raise any harmless-error defense until fifteen years after Mr. Mines first presented his *Penry* claim. As noted, Mr. Mines raised the *Penry* claim in his direct appeal from his death sentence in 1992, and the CCA denied his claim on the merits; this Court remanded for further review, and the CCA adhered to its earlier denial of relief. At no time during that litigation over Mr. Mines' *Penry* claim – in the CCA and in this Court – did the State of Texas ever suggest that *Penry* claims were subject to harmless-error review generally *or* that the specific *Penry* violation in Mr. Mines' case was harmless.

Mr. Mines then pursued his *Penry* claim on federal habeas. Since September 2000, when Mr. Mines initiated this action in federal district court, Petitioner has filed at least six separate pleadings responding to Mr. Mines' *Penry* claim.[11] Yet, Petitioner never even mentioned the words "harmless error" until the very last one – its letter brief in the Court of Appeals dated July 6, 2007. In such circumstances, the lower federal

[11] *See* n. 1, *supra* (identifying those pleadings).

courts unvaryingly find any harmless-error defense to have been waived and abandoned. *See, e.g.*, *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) ("Respondent also argues that any error in the jury instructions was harmless . . . . However, the Respondent did not make this argument in the district court, so it is waived."); *United States v. Cacioppo*, 460 F.3d 1012 (8th Cir. 2006) ("the Government did not argue that the alleged instruction error was harmless, and the failure to do so waives any right to such review"); *Lam v. Kelchner*, 304 F.3d 256, 269 (3rd Cir. 2002) ("The first flaw in the Commonwealth's harmless error argument is that it was never raised before the District Court and was therefore waived."); *Jenkins v. Nelson*, 157 F.3d 485, 494 n. 1 (7th Cir. 1998) ("[Petitioner] contends that Respondent has waived harmless error by failing to raise it before the district court. Generally, when a party fails to raise an issue in the district court, the issue is waived, and we will not consider it on appeal."); *Calvert v. Wilson*, 288 F.3d 823, 836 (6th Cir. 2002) (Cole, J., concurring) ("While a petitioner has the responsibility of ensuring that all claims in support of a petition for writ of habeas corpus are timely raised, so too does the warden bear the responsibility of ensuring all defenses, including harmless error, are timely raised."); *Nelson v. Quarterman*, 472 F.3d 287, 332 (5th Cir. 2006) (*en banc*) (Dennis, J., concurring) ("[T]he state can waive harmless error review by failing to raise the issue in a timely and unequivocal manner in the district court") (citing cases), *cert. denied*, __ U.S.___, 127 S. Ct. 2974 (2007); *see also* 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure § 31.2, at 1512 & n.1 (5th Ed. 2005) ("Like other defenses to habeas corpus relief, the 'harmless

error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense.").

Here, Petitioner not only failed to raise any harmless-error issue in federal district court; it failed to assert harmless error in its merits brief in the Court of Appeals *after* that court had granted a certificate of appealability on Mr. Mines' *Penry* claim. The Courts of Appeals routinely find arguments waived which are not presented in a party's principal brief on the merits. *See, e.g., United States v. Fields*, 483 F.3d 313, 352 n. 36 (5th Cir. 2007) (appellant waives issue by not raising it in his opening brief); *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (same); *cf., e.g., Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. We have consistently refused to consider arguments withheld until the reply brief.") (internal quotation marks and citation omitted). Mr. Mines respectfully submits that this Court ought not to make a special exception to that settled practice in order to reach the issue urged by Petitioner.

Moreover, even when Petitioner finally raised the defense of harmless error for the first time in his July 2007 letter brief, he did not provide the Court of Appeals with a thorough account of the record to facilitate harmless-error review. Petitioner's entire argument focused on *whether* harmless-error analysis should apply, and he offered no discussion whatsoever of the evidence or arguments made at trial to support its claim that the *Penry* error was actually harmless *in Mr. Mines' case*. That omission independently justifies rejecting any harmless-error defense. *See, e.g., United States v. Vega Molina*, 407 F.3d 511, 524 (1st Cir. 2005) (where State made no substantial effort to explain why

constitutional errors were harmless, "we choose not to do the government's homework").[12]

Thus, despite filing numerous, extensive pleadings regarding Mr. Mines' *Penry* claim in both state and federal court since 1992, Petitioner never asserted prior to 2007 that relief should be denied on the ground that the *Penry* error in Mr. Mines' case could be deemed harmless. Even then, Petitioner's briefing on the issue was cursory, conclusory, and without any particularized discussion whatsoever of the record in Mr. Mines' case. Given that Petitioner offers no argument, much less any persuasive one, for this Court to review the unexceptional conclusion that Petitioner waived any claim of harmless error, this Court ought not to use this case as a vehicle for deciding whether *Penry* error can be deemed harmless.

B. The question presented has no jurisprudential or practical significance because it concerns a unique capital sentencing statute that was repealed almost seventeen years ago, and a vanishingly small number of inmates are currently litigating claims related to that long-abandoned statute.

The issue Petitioner urges the Court to accept for review is unworthy of the Court's attention because Petitioner has failed to demonstrate any disagreement among the judges of the Court of Appeals regarding whether harmless-error analysis should be undertaken with respect to *Penry I* claims. It is true that *Nelson v. Quarterman*, 472 F.3d

[12] Although some courts have determined that federal appellate courts retain discretion in limited circumstances to overlook waivers of the harmless-error defense, *see, e.g., United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999) (discussing factors for exercising discretion to overlook state's waiver of harmless-error argument), Mr. Mines respectfully suggests that this Court should not exercise that discretionary power here, especially in light of the substantial record in Mr. Mines' case. *Cf. Nelson*, 472 F.3d at 332 (Dennis, J., concurring in the judgment) (inappropriate to excuse the state's waiver where "[t]he record ... is substantial and the issues are complex").

287 (5th Cir. 2006) (*en banc*), in which the *en banc* Fifth Circuit finally brought its *Penry I* caselaw into compliance with this Court's individualization precedents, reflected deep divisions among the judges of that court regarding what type or extent of mitigating evidence might fall outside the scope of the pre-1991 Texas capital sentencing scheme – that is, what constitutes *Penry I* error in the first place.[13] But not a single member of the *en banc* Fifth Circuit in *Nelson* took the view that harmless-error analysis should apply to *Penry I* claims once a constitutional violation has been found, nor has that position been advanced in any concurring or dissenting opinion in any Fifth Circuit case on *Penry I* error decided since *Nelson*. Indeed, every Fifth Circuit opinion applying *Penry I* through the lens of *Nelson*, *Abdul-Kabir*, and *Brewer* has been decided *unanimously* – whether granting relief, as in Mr. Mines' case, or denying relief, as in *Smith v. Quarterman*, 515 F.3d 392 (5th Cir. 2008) At a minimum, it is a strong basis for denying review that Petitioner has utterly failed to show any disagreement among the judges of the court below regarding the precise legal issue Petitioner insists this Court should expend its limited resources to consider.

Moreover, the issue Petitioner urges this Court to address has only the narrowest and most fact-specific application, affecting only a handful of cases. First, the type of error in question arose only under Texas' former capital sentencing statute. That statute was nearly unique in the United States; the only other death penalty jurisdiction that attempted to employ a quasi-mandatory scheme like Texas' rigid special verdict format was Oregon, which never pursued many death sentences and in any event reformed its

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[13] Unsurprisingly, those divisions have disappeared since this Court subsequently clarified the scope of *Penry I* in *Abdul-Kabir* and *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

statute altogether after *Penry I*. *See State v. Wagner*, 786 P.2d 93, 101 (Ore. 1990) (mandating that special issue questions be supplemented with broad instruction empowering jurors to give effect to mitigating evidence by imposing a sentence less than death).[14] Second, the type of error in question arose only in *certain cases* tried under the former Texas scheme, where the defendant presented mitigating evidence that had relevance to his personal culpability outside the scope of Texas' former "special issue" questions. *See Penry I*, 492 U.S. at 317-320 (former Texas scheme was not facially unconstitutional, but only defective as applied in certain factual contexts). Finally, the Texas Legislature nearly seventeen years ago replaced Texas' constitutionally problematic former statute with one that reliably conforms in every instance with constitutional requirements. *See Penry II*, 532 U.S. at 803 (noting the "brevity and clarity" of Texas' "clearly drafted" post-1991 statutory instruction on mitigating evidence). Thus, even in Texas, a ruling on the question presented here would have no prospective application whatsoever.

For all these reasons, the universe of *Penry I* claims is necessarily a decidedly limited one. Inmates sentenced under that long-abandoned statute constitute a tiny and dwindling minority of those currently on Texas's death row, and only a small fraction of

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[14] Notably, every single Oregon death sentence imposed prior to 1989 was reversed on the basis of this Court's decision in *Penry I*. *See* William R. Long, "A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's," 39 WILLAMETTE L. REV. 1, 5 (2003) (describing the "immediate awareness [in Oregon] that *Penry* would require remands, if not retrials, of all twenty-three men on death row in 1989").

those inmates, likely only about a dozen, are presently litigating *Penry* claims.[15] Given the uniqueness of Texas' former statute, and of the constitutional error it sometimes generated, any principle this Court might announce in Respondent's case would have no general application to the administration of capital punishment across the Nation. For all these reasons, this Court's intervention is unwarranted.

C. The same considerations that render the issue in this case uncertworthy – the unique problems presented by the former Texas statute – also provide compelling support for the view that harmless error analysis is inappropriate to *Penry I* claims.

The same features of Texas' former statute that would limit the applicability of any ruling by this Court on the question presented also explain why harmless error analysis of *Penry I* claims is inappropriate. The unique structure of the former Texas capital sentencing statute distinguishes it in at least two ways from other schemes this Court has examined for compliance with the individualization requirement, and to which it has suggested that harmless-error analysis might appropriately be applied.

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[15] Although more than a dozen inmates still on Texas' death row were sentenced under the pre-1991 scheme, many have no *Penry* claim to litigate, even if they presented potentially problematic mitigating evidence at trial. The Texas Court of Criminal Appeals has concluded that Texas' statutory "abuse of the writ" doctrine will sometimes bar litigation of *Penry* claims in such cases. *See, e.g., Ex parte Hood*, 211 S.W.3d 767 (Tex. Crim. App. 2007). Condemned Texas prisoners sentenced under the pre-1991 statute who did not present a *Penry* claim in an earlier federal habeas proceeding are likewise precluded from doing so now, *see In re Kunkle*, 398 F.3d 683, 684-85 (5th Cir. 2005) (*Penry* claims do not satisfy the statutory conditions for obtaining merits review in a second or successive federal habeas application), and those who unsuccessfully urged the claim in an earlier federal habeas application are likewise barred from raising it anew. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application ... that was presented in a prior application shall be dismissed"). For all these reasons, the number of death-sentenced Texas prisoners who were tried under the pre-1991 statute, but are nevertheless still in a position to assert a *Penry* claim at this late date, is vanishingly small.

First, the inflexible nature of the pre-1991 Texas scheme severely constrained the development and presentation of the case for life – including both the mitigating evidence offered, and defense counsel's argument to the jury. Simply put, Texas lawyers charged with the responsibility of presenting a case in mitigation were aware that the jury would not be authorized to give consideration and effect to evidence demonstrating the defendant's reduced moral culpability. Instead, as defense counsel knew, the jurors would be directed to return answers only to the questions on the statutorily mandated verdict form, asking whether the defendant had killed "deliberately" and might present a threat of future criminal violence, and those bare "yes" or "no" answers would dictate the defendant's sentence.

Reasonable defense lawyers, facing that litigation environment, struggled to decide how much and what type of mitigating evidence to risk presenting, given that – as *Penry I* eventually recognized – much relevant evidence of diminished culpability would also tend to support an affirmative answer to the "future dangerousness" question, and thereby expose the client to a death sentence. In effect, defense lawyers who chose to present such mitigating evidence notwithstanding the constraints of the pre-1991 Texas scheme were gambling with their clients' lives that the jurors would, in essence, nullify the verdict form in order to guarantee a life sentence. *See May v. Collins*, 904 F.2d 228 (5th Cir. 1990) (Reavley, C.J., and King, C.J., specially concurring) (observing that jurors in Texas capital cases tried before *Penry I* "were prevented from hearing extremely probative evidence on [the defendant's] moral culpability and on the appropriateness of a death sentence," depriving the defendant of the jury's "fully informed judgment of his crime and his character," because the "fixed state of the law" strongly counseled defense

attorneys in possession of such double-edged mitigating evidence to withhold it, lest they "do more harm than good by bolstering the state's case [for] future dangerousness").

As a result of the pressure the former Texas statute placed on reasonable defense counsel not to present "double-edged" mitigating evidence of diminished culpability, pre-*Penry I* capital trials in many Texas cases produced systematically distorted records that fail accurately to reflect the true balance of aggravating and mitigating circumstances. For this reason, the analytical tools reviewing courts usually employ in performing harmless-error analysis are unavailable in the *Penry I* context. As this Court is aware, assessing the harm from a constitutional violation in a capital sentencing hearing typically involves examining the range of aggravating and mitigating circumstances presented, the strength of the evidence supporting the existence of those factors, the nature and character of the arguments of counsel, and so on. But those elements of the sentencing record are precisely the ones that were cut to fit the Procrustean bed of the pre-1991 Texas scheme. In the absence of a vehicle to permit the meaningful consideration of mitigating evidence – and in the threatening presence of a mandatory "future dangerousness" inquiry that could turn otherwise powerful mitigating evidence of diminished culpability into support for a death sentence – defense attorneys may well have downplayed mitigating evidence that in a properly functioning scheme would have served as the centerpiece of counsel's case for life. As a result, any attempt to perform harmless-error analysis of the sentencing record in such cases, where every aspect of defense counsel's sentencing presentation was constrained and informed by the unique former Texas statute, would be purely and irreducibly speculative. *Penry I* error can hardly be "quantitatively assessed in the context of other evidence presented," *Arizona v.*

Fulminante, 499 U.S. 279, 307-08 (1991), because the most pernicious consequence of the pre-1991 statutory scheme may have been that key evidence was *not* presented or argued to the jury.

At a minimum, accurately assessing the harm flowing from the preclusive effect of the pre-1991 Texas statute in such cases would require giving the defendant an opportunity to demonstrate, at a hearing, that his counsel's presentation was distorted in this manner, and to place into evidence the fully developed case in mitigation that would have been presented if the proceeding had been governed by a fully functioning constitutional sentencing statute (like the post-1991 Texas scheme). This marks another way in which Mr. Mines has been substantially prejudiced by Petitioner's inexcusable delay in asserting the harmless-error defense to Mr. Mines' *Penry I* claim in the first place. Had Petitioner timely asserted that defense, Mr. Mines could have presented these arguments to the courts below, and could have sought a fair opportunity in state court or federal district court to make a full record of the extent to which the preclusive impact of the former Texas statute distorted the evidentiary picture that emerged at the sentencing hearing in his case. Petitioner's dilatory tactics have made that impossible.

In the final analysis, however, even armed with a detailed record of the additional mitigating evidence and argument that the jury would have heard, had Texas' pre-1991 statute not exercised a distorting influence over defense counsel's development and presentation of Mr. Mines' case for life, a reviewing court would nevertheless find itself reduced to speculation in trying to reconstruct how a properly instructed jury might have responded to that evidence. That consequence follows from the pre-1991 statute's most distinctive feature – its lack of any straightforward vehicle for the jury to express its

global conclusion regarding the appropriate sentence for the defendant. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court recognized that "the entire premise" of conventional constitutional harmless-error review is that there exists a jury verdict on the ultimate issue "upon which harmless-error scrutiny can operate." *Id.* at 280. In other words, harmless-error analysis assumes that the jury's verdict will serve as a point of departure for examining whether that verdict might have been affected by (*e.g.*) the admission of improper evidence, the exclusion of proper evidence, an improper argument by counsel, or the omission of an element of the offense from the jury's charge. In *Sullivan*, the jury had been directed to apply an improperly burdensome definition of "reasonable doubt," the indispensable term in judging guilt, in deciding the case; as a result, there was *no verdict* finding Sullivan guilty within the meaning of the Anglo-American legal tradition, and thus no baseline from which a reliable harmless-error analysis could proceed.

Precisely the same is true of the former Texas system. By design, it lacked any vehicle for the jury to express its ultimate conclusion about the appropriateness of a death sentence for the particular defendant. And, as explained above, the absence of any such vehicle sharply constrained defense counsel's presentation and argument of the evidence that might have supported a life sentence in a particular case. Thus, in cases presenting *Penry I* error, just as in *Sullivan*, there is no underlying verdict – *i.e.*, no expression by the jury of the conclusion that death is the appropriate sentence – which a reviewing court can take as the starting point for considering how that verdict might have been influenced by the constitutional violation. Indeed, the vice of the pre-1991 Texas scheme was precisely that, where the defendant had presented mitigating evidence bearing no

straightforward mitigating relationship to deliberateness or dangerousness, a reviewing court could have no confidence that the sentence automatically triggered by the jury's answers to the special issues corresponded to its assessment of the appropriate sentence. *See Penry I.* In the absence of such a verdict, "[a] reviewing court can only engage in pure speculation" about the extent to which the particular constitutional violation may have affected the outcome. *Sullivan*, 508 U.S. at 281. Moreover, in cases tried prior to *Penry I*, there is an unacceptable risk that the very trial record itself – the locus of attention in conventional harmless-error analysis, *see supra* – has been distorted by the former statute's tendency to keep vital double-edged mitigating evidence of reduced culpability out of the record.

For all these reasons, Petitioner's breezy suggestion that *Penry I* error constitutes run-of-the-mill jury instruction error is insupportable. We note that it is not necessary to find that *Penry I* error is "structural" error in the sense that it produces a "defect in the … trial mechanism," *Fulminante*, 499 U.S. at 309, to conclude that harmless-error analysis is inappropriate for such claims. As this Court has noted, the status of a constitutional violation as "trial error" is not always "the touchstone for the availability of harmless-error review." *United States v. Gonzalez-Lopez*, 548 U.S. 140, __ n.4, 126 S. Ct. 2557, 2564 (2006). Instead, the Court has seen fit to "rest [its] conclusion of structural error upon the difficulty of assessing the effect of the error." *Id.* Treating "fundamental unfairness as the sole criterion of structural error" is "inconsistent with the reasoning of [this Court's] precedents," which do not support the "assert[ion] that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural." *Id.* (emphases in original). Petitioner apparently urges the same view as the

Gonzalez-Lopez dissenters, maintaining that despite the *Penry I* error, Mr. Mines' sentencing trial was somehow constitutionally fair. Petition at 20 (asserting that "nothing in the record suggests that the death sentence imposed [on Mr. Mines] reflects something less than the jury's 'reasoned moral response'"). On the contrary: Mr. Mines had a trial marred by the pervasive effect of Texas' unconstitutionally preclusive pre-1991 sentencing statute, and *this Court has held* that a jury constrained by the pre-1991 Texas scheme had no vehicle for expressing its "reasoned moral response" to evidence of severe mental impairment like Mr. Mines' by imposing an appropriate sentence. *See Penry I*, 492 U.S. at 322. As Mr. Mines has explained, assessing the effect of that *Penry I* error presents unique and substantial difficulties that justify foregoing harmless-error review, in part because such analysis necessarily would include, at a minimum, "difficult inquiries concerning matters that might have been, but were not, placed in evidence." *Rose v. Clark*, 478 U.S. 570, 579-80 and n.7 (1986).

In describing "structural errors" which do not lend themselves to harmless error analysis, this Court has focused on errors that affect the overall manner in which evidence is received or considered as opposed to those involving the erroneous admission or exclusion of particular pieces of evidence. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279 (1991) (finding it possible to assess the impact of an erroneously admitted involuntary statement on the overall evidentiary picture). But a sentencing scheme that conditions jurors' consideration of a defendant's constitutionally relevant mitigating evidence on their willingness to disregard their oaths is precisely the sort of structural error that cannot be subject to routine harmless error review. The central feature of *Penry I* error is that it puts jurors to an intolerable choice: they must either answer the special

issues truthfully, in which case they are not only precluded from giving mitigating effect to evidence like Mr. Mines' severe mental illness, but must actually give it *aggravating* effect; or they must disregard their oaths and answer the special issues *falsely* in order to reflect their conclusion that the mitigating evidence justifies a sentence less than death. *Cf. Beck v. Alabama*, 447 U.S. 625, 642 (1980) (error is not subject to harmless-error analysis is impossible where a reviewing court is reduced to "purest conjecture" about the basis for the jury's action). From a practical point of view, a reviewing court cannot possibly gauge the effect of such error, because it could only speculate about the jurors' willingness to lie in order to give mitigating effect to the defendant's evidence. A sentencing scheme under which jurors could only give mitigating effect to evidence of severe mental disability by falsifying their answers on the statutorily required verdict form – whether or not jurors were expressly instructed to that effect – is fundamentally flawed in a way that can never be dismissed as harmless, because it introduces a type of capriciousness impossibly inconsistent with the command for heightened reliability in capital cases.[16]

Finally, these unique aspects of the *Penry I* problem – the absence of a verdict regarding the appropriate sentence that could serve as the point of departure for harmless-error review, and the distortion of the trial record that likely resulted from the preclusive effect of the former Texas scheme – distinguish *Penry I* errors from other

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[16] Indeed, the "*Penry I*" situation, in which jurors must decide for themselves what to do where the statutorily required verdict form does not permit them to express their reasoned moral response to the mitigating evidence in the form of an unambiguous vote for life, is arguably even more likely to be harmful to the defendant than the "*Penry II*" situation (*see Penry v. Johnson*, 532 U.S. 782 (2001)), in which jurors are at least instructed by the trial court – however confusingly – that endorsing a literally false answer to one of the "special issues" is permitted under special circumstances.

individualization errors which the Court has suggested might be subject to harmless error review, such as *Hitchcock* error under the *Proffitt*-era Florida capital sentencing statute. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Proffitt v. Florida*, 428 U.S. 242 (1976). Under the former Florida scheme, large reservoirs of mitigating evidence could be directly addressed by jurors within the scope of the enumerated mitigating factors – including several that spoke very broadly to evidence of diminished moral culpability that would have functioned as aggravating (and therefore been withheld by reasonable defense counsel) under the pre-1991 Texas scheme.[17] Equally important, the version of the Florida statute at issue in *Hitchcock* expressly directed that the jury return a general sentencing recommendation, based on its weighing of aggravating and mitigating circumstances, expressing its conclusion "whether the defendant should be sentenced to life (imprisonment) or death" – precisely the sort of verdict that could serve as the basis from which meaningful harmless-error review could proceed, and precisely the type of verdict that was completely *absent*, by design, from the pre-1991 Texas statute. *See Proffitt*, 428 U.S. at 248 (describing Florida statute). Thus, even if *Hitchcock* can be read to support the conclusion that harmless-error review might be appropriate for certain individualization errors occurring under certain statutory schemes, it offers no support whatsoever for Petitioner's claim that *Penry I* error falls into that category.[18] Indeed, the

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[17] For example, the *Proffitt*-era Florida statute expressly authorized jurors to consider as mitigating, *inter alia*, the "influence of extreme mental or emotional disturbance" on the defendant's state of mind at the time of the crime; whether the defendant "acted under extreme duress," and whether his "capacity ... to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *See Proffitt*, 428 U.S. at 248 n. 6.

[18] Petitioner substantially overstates the case in claiming that this Court has "determin[ed] that *Hitchcock* error can be harmless," Pet. at 14. The Court in *Hitchcock* simply

only relevant observation from *Hitchcock* is that a State's failure to make a timely assertion of a harmless-error defense precludes application of that doctrine.

D. The strength of the mitigating evidence presented by Mr. Mines precludes a finding of harmlessness under any standard and thus counsels against use of this case as vehicle for addressing the highly-technical, statute-specific issue.

Finally, the circumstances of this case compel a finding of harm under any standard, which makes this case a particularly poor vehicle for addressing the harmlessness issue.

As an initial matter, Mr. Mines' extensive mitigating evidence – which showed that he suffered from a life-long, brain-based severe mental disorder with pervasive impact on his ability to control his impulses – was precisely the kind of evidence this Court has specifically identified as highly relevant to the life-or-death decision. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 288 (2004) (defendant's "[i]mpaired intellectual functioning" was mitigating); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding reasonable probability that evidence of Williams' mental impairments would have "influenced the jury's appraisal of his moral culpability"); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998) (jury instructions sufficient to permit consideration of defendant's "mental and emotional problems"); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990) (reversing where jury instruction precluded consideration of evidence that McKoy, *inter alia*, exhibited signs of mental disturbance); *Bell v. Ohio*, 438 U.S. 637, 641-42 1978) (reversing where sentencer could not give independent mitigating effect to the fact that the defendant was "mentally

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observed that the State – like Petitioner *here*, at almost every prior stage of the proceedings – had made no effort whatsoever to argue that the error in Hitchcock's case was harmless. Accordingly, the Court simply proceeded to reverse his death sentence. *Hitchcock*, 481 U.S. at 399. That observation does not a holding make.

deficient"); *Mills v. Maryland*, 486 U.S. 367, 370 n.1 (1988) (same, where jury could not give effect to defendant's "minimal brain damage"); *California v. Ramos*, 463 U.S. 992, 995 n.2 (1983) (defendant's mitigating evidence included "mild congenital brain damage"); *Florida v. Nixon*, 543 U.S. 175, 192 (2005) (the defendant's possible brain damage was a mitigating factor reasonable defense counsel could have emphasized); *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005) (finding prejudice from, *inter alia*, defense counsel's failure to discover the defendant's organic brain impairment); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*) (state court properly considered the totality of the mitigating evidence because it specifically considered expert testimony that the defendant "had a minimal brain injury of a type associated with impulse disorder ....") (citation and internal quotation marks omitted)).

In this case, there is a much greater likelihood of harm from the absence of any vehicle allowing the jury to consider Mr. Mines' severe mental disorder as mitigating. The reason why is simple: because the defense had argued throughout the guilt phase that Mr. Mines' bipolar disorder was the proximate cause of his savage attack on Mrs. Moreno and her daughter. *See, e.g.*, RR X at 268 (defense counsel's closing argument: "I'm just saying the man is insane. Everybody knew it. That's why what happened, happened."). Jurors need not have found Mr. Mines legally "insane" at that time of the crime in order to have agreed that Mr. Mines was seriously mentally ill and that his illness triggered the assault.[19] Moreover, the jury also heard that Mr. Mines had

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[19] Dr. Schack testified that when bipolar disorder is active, the sufferer may find it "very difficult" to control his behavior; even in court, many "simply cannot control themselves." RR X at 179. Since the Texas insanity defense contains no "volitional" component, but instead asks only whether the defendant knew right from wrong at the

committed other violent crimes in Virginia and North Carolina, and that Mr. Mines, when confronted, tended to erupt aggressively. RR X at 234. They heard that Mr. Mines' illness would make him "very impulsive" and lead him to "become violent ... [or] dangerous." *Id.* at 161. For all these reasons, here – as in *Tennard* – jurors almost certainly regarded Mr. Mines' bipolar disorder as requiring them to answer the future dangerousness question "yes," making the *Penry I* violation harmful under any standard of review.

For this reason, Petitioner's attempt to rely on the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164 (1988) is particularly inapposite. *See* Petition at 20 (echoing the *Franklin* plurality's surmise that Texas jurors operating under the pre-1991 statute might have undertaken an "internal weighing" of the aggravating and mitigating aspects of a defendant's evidence) (citing *Franklin*, 487 U.S. at 182 n.12) (plurality opinion). But in subsequent close examinations of the former Texas scheme as applied in practice, this Court has come fully to appreciate that such a broad interpretation of the former "special issues" is directly contrary to the extraordinarily *narrow* manner in which Texas prosecutors in fact routinely instructed jurors to construe them. *See, e.g.*, *Tennard*, 542 U.S. at 288-89 (prosecutor encouraged jurors to give "aggravating effect [to Tennard's low IQ evidence] in considering his future dangerousness," emphasizing that under the Texas scheme "the reasons why [a defendant became] a danger [to society] are not really relevant"); *Brewer*, 127 S. Ct. at 1711 (prosecutor de-emphasized mitigating effect of

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time of the crime, *see* CR at 110, the jury may well have convicted Mr. Mines of capital murder even though they *also* concluded that his bipolar disorder made it impossible at times for him to control himself – an inference with obvious mitigating implications for Mr. Mines' personal culpability, but obvious aggravating implications for his "future dangerousness."

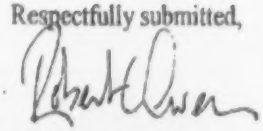
defendant's deprived background and argued that jurors "lacked the power [under the former Texas statute] to exercise moral judgment in determining Brewer's sentence," because their oaths limited them to "answer[ing] the questions according to the evidence"); *see also* Relevant Facts *supra* (describing prosecutorial comments during voir dire and closing argument in Mr. Mines' own case).

Accordingly, even if it were appropriate to apply harmless-error analysis to Mr. Mines' *Penry I* claim, the record in his case compels a finding of harm. The fact that applying harmless-error review ultimately would make no difference in the outcome is yet another reason making Mr. Mines' case a poor vehicle for examining the intricacies of the harmless-error doctrine as it might apply to *Penry I* claims.

CONCLUSION

The Court should deny *certiorari*.

Respectfully submitted,



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No. _____

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

CHARLES E. MINES, JR.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX
VOLUME I

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FILED: February 26, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11137

CHARLES E. MINES, JR.

Petitioner-Appellant,

V.

Nathaniel Quarterman, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CV-2044-H

Before BARKSDALE, GARZA, and DENNIS, Circuit Judges.

Petitioner, Charles E. Mines, Jr., filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mines is an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division, of which Respondent is the director.

Mines was convicted of capital murder by a jury and sentenced to death by lethal injection. The Texas

Court of Criminal Appeals ("TCCA") affirmed his sentence and conviction. *See Mines v. Texas*, 852 S.W.2d 941 (Tex. Crim. App. 1992). The United States Supreme Court granted his petition for certiorari and remanded the case to the TCCA for reconsideration in light of its opinion in *Johnson v. Texas*, 509 U.S. 350 (1993). *See Mines v. Texas*, 510 U.S. 802 (1993).On remand, his conviction and sentence were again affirmed. *See Mines v. Texas*, 888 S.W.2d 816 (Tex. Crim. App. 1994), cert. denied, 514 U.S. 1117 (1995). Mines's state application for a writ of habeas corpus was denied by the TCCA. *See Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000).

Mines filed his initial§ 2254 petition for a writ of habeas on December 21, 2000, and an amended petition on April 20, 2001. Respondent answered on June18, 2001, and furnished the state records. A United States magistrate judge recommended dismissal or denial of all Mines's claims, and the district court adopted the magistrate's findings, conclusions, and recommendations. *See Mines v. Cockrell*, 2003 WL 21982190 (N.D. Tex 2003). The district court also denied Mines's petition for writ of habeas corpus, dismissing the petition with prejudice. Mines filed a notice of appeal. Subsequently, the magistrate judge recommended that a Certificate of Appealability ("COA") should be denied and the district court adopted this recommendation, entering an order that denied Mines's request for a COA.

Mines petitioned this court for a COA on four grounds, and we granted a COA for two of them: (1) whether Mines's Fifth and Fourteenth Amendment rights were violated by Dr. Grigson's testimony regarding Mines's demeanor in invoking his rights and remaining silent when Dr. Grigson attempted to evaluate Mines;

and (2) whether the Texas special issues sentencing scheme precluded the jury from giving effect to Mines's mitigating evidence of mental illness. *See Mines v, Dretke*, 118 F. App'x 806 (5th Cir. 2004).

The court originally scheduled oral argument on the merits of these two issues for August 31, 2005, but the case was continued due to Hurricane Katrina. Having now heard argument, we DENY Mines's petition on the ground that Dr. Grigson's testimony constituted harmless error but GRANT the petition on the ground that the Texas special issues sentencing scheme precluded the jury from giving effect to his mitigating evidence of mental illness.

BACKGROUND

On the afternoon of May 27, 1988, Mines broke into a home occupied by eighty-year-old Vivian Moreno and her invalid daughter, Frances. Upon encountering the women, Mines brutally attacked them with a claw hammer. Vivian was killed instantly, but Frances survived Mines's attack.

Three days later, police apprehended Mines. Within hours of his arrest, Mines confessed to the crime and was charged with the capital murder of Vivian and the attempted capital murder of Frances. Mines pleaded not guilty by reason of insanity to both charges, and he requested a hearing in state court to determine his competence to stand trial.

In support of his request for a competency hearing, Mines produced the testimony of a psychiatric expert, Dr. Schack, and his medical records. Those records indicated

that the State had attempted to civilly commit Mines to the custody of a mental hospital approximately a week prior to Vivian Moreno's murder. Following a five-day observation period, the treating physician at the state mental hospital, Dr. Nguyen, determined that Mines was not mentally ill and concluded that Mines should not be committed to the hospital involuntarily. But Dr. Nguyen concluded that Mines did have "a mixed personality disorder with paranoia, passive, aggressive, anti-social features." The state trial court granted Mines's request for a competency hearing, and the issue of Mines's competency to stand trial was presented to a jury.

Mines's primary evidence of his incompetence to stand trial was the testimony of Dr. Schack, Mines's medical records, and the State's attempt to civilly commit him to the state mental hospital. Dr. Schack testified that he had difficulty in getting Mines to cooperate during his attempts to interview Mines. Dr. Schack also testified that much of his diagnosis was based on his observation of Mines on several occasions as well as review of Mines's medical records. Dr. Schack conceded that it is not uncommon for criminal defendants to simulate symptoms of a mental disorder in an attempt to avoid liability for their crimes. Despite this concession, however, Dr. Schack unequivocally testified that in his opinion Mines's symptoms of mental illness were genuine and that he was incompetent to stand trial for capital murder.

In rebuttal, the State offered expert testimony of: (1) Dr. Grigson, a forensic psychologist; (2) Dr. Nguyen, who had observed Mines while he was at the state mental hospital; and (3) several of Mines's jailers. The jailers testified that Mines was capable of having normal conversations and that Mines appeared to be a fairly

intelligent self-educated person who seemed to understand that he had certain rights in jail. The jailers also testified that Mines appeared to understand that he was in jail, why he was in jail, and that when Mines wanted to get along with the jailers and inmates, he could. The jailers testified, however; that Mines could become extremely agitated at other times, and consequently, Mines was confined in a cell by himself.

Dr. Grigson testified that Mines refused to talk to him after Dr. Grigson advised Mines of his right to refuse the examination; that Mines appeared to understand this right; and that his opinion of Mines's competency to stand trial was based entirely upon Mines's medical records and Dr. Grigson's limited observances of Mines before and during the competency hearing. Dr. Grigson testified that he believed that Mines was competent to stand trial and that Mines's seeming irrational behavior was "very deliberate and intentional." Dr. Grigson also mentioned briefly that it was not uncommon for criminal defendants to simulate mental illnesses in an attempt to avoid liability for their crimes. Mines's counsel vigorously cross-examined Dr. Grigson and elicited testimony that the doctor testified so often and effectively for the State in death penalty cases that he was called "Dr. Death" by the media. Dr. Grigson also conceded that he had spent little more than three minutes speaking to Mines and that his practice of using forensic psychology to predict future dangerousness was looked upon with disfavor by the American Psychiatric Association.

Dr. Nguyen testified that after observing and interacting with Mines over a five day period, he, and the rest of the treatment staff at the mental hospital, concluded that Mines was not incompetent. Instead, Dr.

Nguyen believed that Mines had a mixed personality disorder and that Mines was capable of understanding his actions. Dr. Nguyen also testified that Mines could be uncooperative at times and that Mines was "selective in choosing who he talked to." On cross-examination, Dr. Nguyen conceded that he had more patients in his care than he would have preferred at the time he first saw Mines and that it was his decision not to civilly commit Mines.

The jury concluded that Mines was competent to stand trial for the capital murder of Vivian Moreno and the attempted capital murder of her daughter, Frances. Substantially the same expert testimony that was presented during the competency hearing was presented during the murder trial. Though the State presented evidence relating to the crime scene and the conditions of Vivian and Frances Moreno when they were found, approximately 40 percent of the testimony heard by the jury during the murder trial was the testimony of Drs. Schack, Grigson, and Nguyen.

Ultimately, the jury rejected Mines's insanity defense and convicted him of both capital murder and attempted capital murder. After the jury answered all three of the special issues in the affirmative, the state trial court sentenced Mines to death.

STANDARD OF REVIEW

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and review its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Coble v. Quarterman*, 496 F.3d 430, 434-35 (5th Cir. 2007) (quoting *Thompson v, Cain*, 161 F.3d 802, 805 (5th Cir. 1998)).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governed the district court's federal habeas review because Mines filed his federal habeas petition *after* AEDPA's effective *date. See id. at 435.* AEDPA makes habeas relief unavailable to a state prisoner for any claim adjudicated on the merits in state court proceedings unless the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision based on an unreasonable determination of the facts inlight of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

"Under AEDPA, *our* duty *is* to determine whether the state court's determination was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court at the time that [Mines's] conviction became final." *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006) (en banc) (citing Will *lams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court *decision is contrary to* clearly established Supreme *Court* precedent *if:* (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable *from a* decision *of* [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams, 529* U.S. *at* 405-06. *A* state court decision *is an* unreasonable application of clearly established Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08.

DISCUSSION

A. Dr. Grigson's Testimony

Mines contends that his Fifth and Fourteenth Amendment rights were violated by Dr. Grigson's testimony regarding Mines's demeanor in invoking his rights and remaining silent when Dr. Grigson attempted to evaluate Mines. Attrial, though, Mines offered no contemporaneous objection to Dr. Grigson's testimony, and the district court adopted the magistrate judge's recommendation to deny this claim on the basis of harmless error even though the magistrate judge found that it was a "close call" as to whether the admission of this testimony was contrary to the Supreme Court's teaching in *Wainright v. Greenfield,*[1] 474 U.S. 284 (1986).

We agree with the magistrate judge that it is a "close call" whether the admission of Dr. Grigson's testimony was a violation of Mines's rights, but we also agree that the error, if any, in admitting this testimony was harmless under *Brecht v.. Abrahamson*, 507 U.S. 619 (1993).[2] Specifically, *the* comment by Dr. Grigson was only a small part of his testimony and was not the sole or even a major basis for Dr. Grigson's conclusion that Mines was sane at the time of his offense. Moreover, testimony by the other prosecution expert, Dr. Nguyen, and indeed Mines's own expert, Dr. Schack, established

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[1] In Greenfield, the Supreme Court held that a defendant's invocation of silence may not be used as substantive evidence of his guilt or sanity.

[2] Because any error here *was* harmless, *we need not* reach *the issue of* whether Mines's failure to offer a contemporaneous objection to Dr. Grigson's testimony constitutes a procedural bar.

that criminal defendants have both the incentive and propensity to simulate mental illnesses in an attempt to avoid responsibility for their actions. Thus, it is unlikely that Dr. Grigson's improvident comment regarding Mines's silence had any substantial or injurious effect or influence on the jury's guilty verdict in this case. Accordingly, we affirm the district court's denial of habeas relief on this claim.

B. Texas Special Issues.

Mines also claims that the Texas special issues sentencing scheme precluded the jury from giving effect to his mitigating evidence of mental illness. Specifically, Mines argues that the special issue interrogatories in the Texas capital sentencing instruction, as applied to his case, precluded effective presentation of mitigating evidence in violation of the mandates of *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782(2001) ("*Penry II*"). Mines stood trial just a few weeks before the Supreme Court's decision in Penry I, and his jury received the same special issue interrogatories considered in Penry 1.

In Penry I, the Supreme Court held that the first two "special issue" interrogatories in the Texas capital sentencing instructions, though facially valid, failed to satisfy the constitutional requirement that a capital defendant be able to present and have the jury give effect to mitigating evidence in certain situations. After Penry I, Texas trial courts continued to send the same special issue interrogatories to the jury, but added a

supplemental instruction to "cure"any possible *Penry I* defect.

In *Penry II*, the Supreme Court again considered a constitutional challenge by *Penry*. It considered the supplemental instruction given in *Penry's* retrial, and held that the instruction failed to give *Penry's* jurors a "vehicle" by which they might give effect to his mitigating evidence. Specifically, the Court held that the supplemental instruction potentially created an unacceptable dilemma for the jurors: Because it instructed the jurors to change one of their truthful "Yes" special issue answers to an untruthful "No" if they felt the defendant did not deserve the death penalty, it left the jurors with the choice of either not giving effect to *Penry's* proffered mitigation evidence or, alternatively, violating their oaths as jurors.

Mines's claim is that because his jury instructions were virtually identical to the ones given in *Penry's* trial those instructions created the same situation that the Supreme Court found constitutionally unacceptable in both *Penry I* and *Penry II*. Moreover, Mines argues that both the federal and state courts considering this claim have relied on an analytical model that has been recently invalidated by the Supreme Court, thereby creating some doubt as to whether his *Penry* claim was resolved correctly. We agree for reasons similar to those articulated in *Coble*, 496 F.3d at 430.

As we noted in *Coble*, recent Supreme Court cases have restated the clearly established law and prescribed a two-step process for evaluating *Penry* claims:

In order to grant relief on [Mines's] *Penry* claim, we must first determine whether his mitigating evidence of mental illness .. . satisfied the "low threshold for relevance" articulated by the Supreme Court. *Tennard v. Dretke*, 542 U.S. 274 (2004). If so, we must determine whether there was a reasonable likelihood that the jury applied the special issues in a manner that precluded it from giving meaningful consideration and effect to all of [Mines's] mitigating evidence. *See Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1664, 1668 n. 14 (2007); *Brewer v. Quarterman*, 127 S. Ct.1706, 1710, 1713 (2007); Nelson, 472 F.3d at 293, 315-16.

Coble, 496 F.3d at 444. I n *Tennard*, the Court held that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence," and set the"low threshold" for relevant mitigating evidence as "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value" or "could reasonably find . . . warrants a sentence less than death." *Tennard*, 542 U.S. at 284-85. I n turn, the *Abdul-Kabir* Court then held that "sentencing juries must be able to give meaningful consideration, and effect to all mitigating evidence" and that "when the defendant's evidence may have meaningful relevance to the defendant's moral culpability 'beyond the scope of the special issues,' " a special instruction is required. *Abduk-Kabir*, 127 S. Ct. at 1664, 1668 n.14.

Applying these standards in *Coble*, this court granted a habeas petition because we found "a reasonable likelihood that the Texas special issues precluded the jury from giving meaningful consideration and effect to *Coble's* mitigating evidence." *Id.* at 433. We find the same in

regard to Mines's mitigating evidence.[3] Mines's jury instructions were virtually identical to those given to the juries in the trials of *Penry* and to *Coble*. *Coble* introduced evidence of mental disorders, including bipolar disorder, that this court found to constitute relevant mitigating evidence. Id. at 447-48. Mines introduced similar mitigating evidence of bipolar disorder. Just as the *Coble* court found *Coble's* mitigating evidence to have "meaningful mitigation relevance beyond the scope of the two special issues, such that a special instruction was required," id., so we find the same for Mines. Thus, just as in *Coble*, we find that here "there is a reasonable likelihood that the jury was precluded from giving full effect to [Mines's] mitigating evidence, [and] we hold that the TCCA's determination to the contrary was an unreasonable application of clearly established federal law as determined by the Supreme Court." *Id.* at 447.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of habeas relief on Mines's Fifth and Fourteenth Amendment claims regarding Dr. Grigson's testimony, but we REVERSE the district court's denial of habeas relief on Mines's claim that the Texas special issues scheme precluded the jury from giving

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[3] At oral argument the Respondent conceded as much, noting both that Coble controls and that there is no principled way to distinguish Mines's case from *Coble*. Further, Respondent conceded that our precedent in Nelson, 472 F.3d at 287, forecloses any argument that a *Penry* error can be subject to harmless error review.

consideration and effect to his mitigating evidence of mental illness. Accordingly, we REMAND the case to the district court with instructions to grant a writ of habeas corpus based on Mines's special issues claim consistent with this opinion and remand the matter to state court for a new trial on sentencing.

CHARLES E. MINES, Jr., a/k/a CHARLES ANDERSON, Appellant

No. 70,893 v. Appeal from ELLIS County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of capital murder. V.T.C.A. Penal Code § 19.03(a)(2). Upon the jury's affirmative findings on the three special issues submitted, the trial judge sentenced appellant to death.[1] Art. 37.071(b)(1)-(3) and (e), V.A.C.C.P. Appellant presents two points of error in this direct appeal. Art. 37.071(h). We will affirm the trial court's judgment.

In his first point of error, appellant contends the trial court erred in overruling his challenge to the array. At the conclusion of the voir dire process,[2] appellant filed

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[1] Appellant was convicted of murdering Vivian Moreno, by striking her on the head with a hammer, in the course of committing or attempting to commit the burglary of her home. In a companion case, appellant was convicted of the attempted capital murder of Frances Moreno, Vivian's daughter, which offense arose out of the same incident. Appellant was sentenced to life imprisonment for the offense against Frances.

[2] The record does not indicate if and when the jury, as a whole, was sworn, but the trial on the merits began immediately following the conclusion of the pretrial hearing on the motion challenging the array. The State has not taken issue with the timeliness of appellant's motion. Cf. *Rousseau v. State*, 824 S.W.2d 579, 581 (Tex.Crim.App. 1992) (timely motion under Art. 35.261 made before jury, as a whole, is impanelled).

and presented to the court a motion alleging the jury in this cause was unlawfully impaneled in that "no black, negroid or colored (the phrase preferred by the Defendant himself) jurors were seated by the Court[.]"[3] Of the three black prospective jurors on the panel, defense counsel peremptorily challenged one and the State so challenged the remaining two. Appellant asserts these two prospective jurors were struck by the State solely because of their race in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and Art. 35.261, V.A.C.C.P.[4]

In response to appellant's motion, the prosecutor took the stand and testified as to her reasons for striking the two venirepersons, both of whom were black females. There were two main reasons why the prosecutor struck prospective juror Hamilton. First, Hamilton stated on her juror questionnaire form that she believed in punishment, but not capital punishment. The prosecutor acknowledged, however, that after the three special issues were explained to Hamilton, she stated that she believed in the death penalty and could answer the issues "yes." Nevertheless, the prosecutor felt Hamilton was tentative in her answers, had difficulty understanding

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[3] Appellant also complained "that of the sixty jurors talked to and of the eighty some odd actually seated for voir dire of the sixty, only three were of the same race as [he]", thus intimating a claim under *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). However, no other evidence of a systematic scheme of exclusion was offered, so nothing is presented for our review.

[4] Since appellant's trial was after the effective date of Art. 35.261, the provisions of that article apply. *Hill v. State,* 827 S.W.2d 860 (1992); *Rousseau,* 824 S.W.2d at 581.

the issues, and tended to agree with whatever question was asked of her. On cross-examination by defense counsel, the prosecutor reiterated these same feelings regarding prospective juror Hamilton and added that Hamilton's answers concerning the death penalty needed to be viewed within the context of her voir dire. The second reason proffered for the peremptory challenge against Hamilton was that she had been a maid in defense counsel's home, and the prosecutor felt that that situation might cause Hamilton to have a bias toward any evidence presented by the defense.

There were several reasons offered by the State for its peremptory challenge of prospective juror Champion, who was a minister's wife. Champion stated on her juror questionnaire form that she did not believe in the death penalty because of her religious training, but upon voir dire examination she stated she could answer affirmatively the punishment issues. The prosecutor felt that "[Champion's] answers to questions still tended to be some [sic] equivocal in regard to the death penalty." Moreover, in the prosecutor's opinion, Champion had difficulty understanding the third special issue and the question of insanity.[5] On cross-examination,the prosecutor acknowledged that Champion said she could answer the special issues, but she felt Champion had previously been "very emphatic" in her disbelief in the death penalty.

After explaining why she peremptorily challenged these two black venirewomen, the prosecutor gave her

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[5] Appellant entered pleas of not guilty by reason of insanity to the charges alleged against him in the two indictments.

unsolicited reasons for striking seven similarly situated white female venirepersons. The prosecutor also noted for the record that she did not strike a third black female on the jury panel who initially indicated on her questionnaire that she could assess the death penalty if the offense involved a child. According to the prosecutor, after the law was explained to this venirewoman she stated unequivocally that she could follow [**6] the law and answer the special issues according to the evidence. Defense counsel peremptorily challenged this venirewoman.

The trial judge entered on the record his findings of fact and conclusions of law, noting that he was able to observe the prospective jurors' tone of voice, physical reactions to questions, and any pauses, delays, or spontaneity in their answers to questions. The court found the prosecutor's reasons for striking the challenged venirepersons were related to an issue in the case, namely whether the prospective jurors could affirmatively answer the punishment issues knowing the consequences thereof. The court further found that all jurors, regardless of race, were questioned in the same manner on the same subject matter for essentially the same amount of time. The court concluded the challenged black venirepersons were struck for race-neutral reasons. Appellant's challenge to the array was thus overruled.

For claims made pursuant to Art. 35.261 and *Batson,* this Court has held that the correct standard of appellate review is "clearly erroneous." *Hill,* 827 S.W.2d 860, citing *Williams v. State,* 804 S.W.2d 95, 101 (Tex.Crim.App. 1991); Tennard v. *State,* 802 S.W.2d 678 (Tex.Crim.App. 1990); and *Whitsey v. State,* 796 S.W.2d 707, 726 (Tex.Crim.App. 1989) (Opinion on State's Motion for Rehearing). That is,the reviewing court must view

the record in the light most favorable to the trial judge's ruling and must not disturb that ruling unless the court is "left with a firm conviction that a mistake has been committed." *Harris v. State,* 827 S.W.2d 949 (1992), citing *Williams* and *Whitsey,* supra. This standard of review is necessarily a deferential one as a trial judge's findings on a claim of purposeful discrimination during jury selection are largely based on credibility evaluations made during voir dire and the *"Batson"* hearing. *Robinson v. State,* 851 S.W.2d 216 (1991) (pending on rehearing on other grounds). Thus, in determining whether a trial judge's finding of no purposeful discrimination was clearly erroneous, we consider the challenged prospective juror's voir dire as a whole, as well as other relevant circumstances of the voir dire of the panel, and accord due deference to the trial judge's ruling. *Sterling v. State,*____S.W.2d____(Tex.Crim.App. No.70,829 delivered April 22, 1992).

The record reflects that prospective juror Hamilton initially stated she was against the death penalty, but she recognized there were situations where capital punishment might be appropriate. Hamilton then agreed, however, with the prosecutor's assessment that she did not believe in the death penalty under any circumstances. The prosecutor explained the juror's role in the verdict at the punishment phase and reviewed the three punishment issues with her. After discussing these issues with the prosecutor, Hamilton stated that she now believed in the death penalty. Hamilton answered affirmatively the prosecutor's questions on whether she could answer the punishment issues and whether she believed society had a right to have the death penalty. Hamilton also stated that she was a former maid for defense counsel's mother, but that she had not worked in

his home since the 1960s[6] and that affiliation would not influence her. Before concluding her voir dire examination of Hamilton, the prosecutor once again broached the subject of the death penalty. Hamilton stated on her questionnaire that she did not believe in the death penalty because she "had not thought about it really[.]" Since completing her questionnaire, Hamilton had considered the death penalty and concluded the death penalty was appropriate punishment depending on the crime committed and how it was committed.

Prospective juror Champion also indicated on her questionnaire form that she did not believe in the death penalty as a result of her religious training, but then her statements to the prosecutor regarding her beliefs toward capital punishment became unclear. Upon questioning about the three special issues rather than the death penalty per se, Champion stated that she could answer "yes" to the three punishment issues if the State met its burden of proof.[7] The prosecutor reviewed other relevant trial issues with Champion and then returned to the question of the death penalty. Champion expressed her view that "if the evidence really proved" that the defendant was incapable of rehabilitation, she would not be reluctant to impose the death penalty as punishment.

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[6] The record is unclear as to the precise date of Hamilton's employment.

[7] Initially, Hamilton indicated she could never answer "yes" to the third punishment issue. At this juncture the State challenged her for cause. However, questioning by defense counsel revealed Hamilton was confused about the issue, and thus counsel rehabilitated this prospective juror.

The evidence proven at trial was the factor which would change Champion's "way of thinking" regarding the death penalty.

In his brief, appellant argues the prosecutor's reasons for peremptorily challenging Hamilton and Champion are contrary to direct statements made by the prospective jurors, are frivolous, and do not rebut the prima facie evidence of racial discrimination. The record reflects the prosecutor's reasons for striking these persons from the venire are clear, specific, relevant to issues in this cause, and, most importantly, are facially race-neutral. In our opinion, these reasons are sufficient in and of themselves to rebut a prima facie case of discrimination. The issue to be resolved is whether appellant has sustained his burden of persuasion and rebutted the race-neutral explanations given by the State at the *Batson* hearing. *Williams,* 804 S.W.2d at 101.

In his brief, appellant directs us to testimony in the record from the prospective jurors which is contrary to the race-neutral explanations offered by the State for its two peremptory challenges. Specifically, appellant cites the testimony of venireperson Hamilton where she stated she could answer affirmatively the special issues, that she believed in the death penalty, and that her work as a maid in defense counsel's home would not influence her.[8]

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[8] Appellant also contends the prosecutor's assertion that Hamilton was tentative in her answers is contrary to the record, but he does not cite to any specific testimony to support his contention. Whether Hamilton was in fact tentative during her voir dire depends largely upon circumstances which can only be observed during her voir dire examination, i.e., her demeanor, tone of

As to venireperson Champion, appellant notes she too stated she could answer "yes" to the punishment issues, including the third issue which initially confused her, and that she was not reluctant to give the death penalty as punishment in spite of her religious training. Appellant also points out that Champion had formerly served on a grand jury. Because there is evidence in the record which controverts the State's neutral explanations for its peremptory challenges, appellant asserts the State's reasons for striking the two were necessarily racially motivated. On the basis of the facts of the voir dire and the trial court's findings and conclusions, we do not agree with appellant.

The State has the right, as does the defense, to ask proper questions of prospective jurors so that it may intelligently exercise its peremptory challenges. *Williams,* 804 S.W.2d at 107. Generally, in capital murder prosecutions the State concentrates a substantial portion of its voir dire examination reviewing the prospective juror's beliefs on capital punishment and the three punishment issues. This was true in this case, especially as to venirepersons Hamilton and Champion, who initially stated strong opposition to the death penalty and then changed their opinions. The record reflects, however, that the State questioned these prospective venirepersons on other relevant trial issues, i.e. burden of proof, presumption of innocence, insanity defense, etc., as were all questioned venirepersons. Appellant has not shown any disparate treatment in the questioning of the

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voice, mannerisms, eye-contact with counsel, etc., to which the appellate court is not privy. It is precisely this reason why the reviewing appellate court accords great deference to the trial judge's findings.

jurors or that the prosecutor's explanations were pretexts for intentional discrimination, and indeed such would be difficult in light of the prosecutor's explanations for her strikes of similarly situated white venirepersons. *See generally Cantu v. State,* 842 S.W.2d 667 (1992). Moreover, we find the circumstances in this case present the precise situation where a peremptory challenge is appropriate, *viz:* the prospective juror is not challengeable for cause, but the prosecutor does not believe the venireperson will be a favorable juror for the State, or perhaps the prosecutor considers the person disingenuous because of her change of opinion.

We have reviewed the record and find the trial judge's findings and conclusions are supported thereby. The prosecutor's explanations for her strikes of Hamilton and Champion are race-neutral and logically related to issues presented by this case. *See Tennard v. State,* 802 S.W.2d 678 (Tex.Crim.App. 1990). We find no lack of meaningful questioning of the prospective jurors nor disparate treatment, as we have stated. Therefore we hold appellant has failed to show purposeful discrimination by the State in the exercise of its peremptory challenges. The trial judge's findings and conclusions were not clearly erroneous. Appellant's first point of error is overruled.

In his second point of error, appellant contends the sentencing scheme in Art. 37.071, V.A.C.C.P.was unconstitutional as applied to him (as violative of the Eighth and Fourteenth Amendments to the United States constitution and Art. I, § 13 of the Texas constitution), and that the trial court erred in failing to instruct the jury at the punishment phase of trial on the mitigating evidence of his insanity. Appellant appears to present two

claims in this point. First, appellant argues there was sufficient evidence of his incompetency and insanity to require the trial judge to take the case from the jury, refrain from imposing sentence, and impanel a jury to determine his competency to stand trial, pursuant to Art. 46.02, V.A.C.C.P.[9] Secondly, appellant raises what is now commonly known as a *"Penry* claim.[10]

On June 8, 1089, prior to imposition of sentence in this case (and the companion case), appellant filed a written motion to prevent the imposition of the death penalty. Appellant asserted the evidence showed he was incompetent to stand trial and was insane during commission of the offenses for which he was found guilty; thus, appellant contended the jury verdicts[11] were

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[9] Appellant did not invoke specific provisions of Art. 46.02. [HN6] Section 4(c) provides in pertinent part:

> If the issue of incompetency to stand trial is raised other than by written motion in advance of trial pursuant to Subsection (a) of Section 2 of this article and the court determines that there is evidence to support a finding of incompetency to stand trial, the court shall set the issue for determination at any time prior to the sentencing of the defendant. If the competency hearing is delayed until after a verdict on the guilt or innocence of the defendant is returned, the competency hearing shall be held as soon thereafter as reasonably possible, but a competency hearing may be held only if the verdict in the trial on the merits is "guilty."...

[10] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[11] On March 13, 1989, a competency hearing was held to determine whether appellant was competent to stand trial on the indictments charging him with capital murder and attempted capital murder. A jury returned a verdict of competent in both cases. A separate jury was impanelled for trial in the cause *sub judice.*

contrary to the law and facts. Appellant invoked Art. 46.02 in both his written and oral motions and moved the trial court to follow the provisions of that article rather than impose sentence or, alternatively, impose a life sentence instead of the death sentence. The motion was overruled.

We hold the trial judge did not abuse his discretion in overruling appellant's motion. The trial judge held a pretrial hearing, in accordance with Art. 46.02, to determine appellant's competency to stand trial on the indictment in this cause as well as the companion case. The jury from this hearing found appellant competent to stand trial in both causes. At trial on the merits, appellant pled not guilty by reason of insanity and presented extensive testimony on this defensive issue. In the jury charge at guilt/innocence, the trial judge instructed the jury on the issue of insanity and submitted to them, *inter alia,* a "not guilty by reason of insanity" verdict form. The jury obviously rejected appellant's claim of insanity. At punishment, appellant presented testimony from the same psychiatrist who testified at both the competency hearing and the trial on the merits. In light of the recent adjudication of appellant's competency, the jury's rejection of the insanity defense, and appellant's presentation of the same doctor's testimony at punishment, the trial court did not abuse its discretion by refusing to refrain from assessing punishment and holding another competency hearing. *Gomez v. State,* 492 S.W.2d 486 (Tex.Crim.App. 1973).
As to his *Penry* claim,[12] appellant first generally reviews

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[12] The State contends appellant's claim is waived. The punishment charge was submitted to the jury on June 2, 1989; the *Penry* decision was rendered June 26, 1989. Appellant's claim is not

the cases supporting the facial validity of Art. 37.071,[13] and its treatment of mitigating evidence,[14] and then reviews the evidence in this case as to insanity and incompetency.[15] An extensive amount of testimony was given at trial regarding appellant's mental condition, which we now review.[16]

During the State's case-in-chief, there was little testimony regarding appellant's behavior or his mental faculties following his arrest. According to one investigator from the City of Waxahachie, appellant rationally responded to questions when advised of his rights and followed instructions from the investigator. A former Waxahachie investigator, Maurice Lowrey, who

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therefore waived. *See Black v. State,* 816 S.W.2d 350 (Tex.Crim.App. 1991) (Campbell, J., concurring).

[13] Since appellant's trial, Art. 37.071 has been amended by the 72nd legislature. Art. 37.071, V.A.C.C.P. (Supp. 1991).

[14] Appellant cites, e.g., *Stewart v. State,* 686 S.W.2d 118 (Tex.Crim.App. 1985); *Clark v. State,* 717 S.W.2d 910 (Tex.Crim.App. 1986); *Quinones v. State,* 592 S.W.2d 933 (Tex.Crim.App. 1980); *O'Bryan v. State,* 591 S.W.2d 464 (Tex.Crim.App. 1979); and *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[15] We will not review or consider any of the evidence presented during appellant's competency hearing, as that was tried to a different jury. We focus our attention on the evidence heard by the jury on the trial of the merits.

[16] We have reviewed in great detail the testimony from the guilt/innocence phase regarding appellant's sanity as this testimony may be considered by the jury in its deliberations on the punishment issues. *See Cantu,* No. 70,739, slip op. at p. 5, citing *Santana v. State,* 714 S.W.2d 1 (Tex.Crim.App. 1986).

participated in appellant's arrest on May 30, 1988, and booking at the police station, stated appellant would talk with officers but he refused to tell them his name. Eventually appellant gave a confession which established appellant had previously been arrested for robbery in September of 1987. He remained incarcerated in the Ellis County Jail until May 19, 1988, when the robbery charges against him were dismissed, and he was sent to Terrell State Hospital.[17] Appellant was released from Terrell on May 24, 1988, and he committed this capital murder three days later, on May 27, 1988. Lowrey stated, based upon his conversations with appellant,[18] that he did not believe appellant was insane because he was "self-educated" and very intelligent, had a pleasant manner and good attitude, and was aware of the circumstances in which he was situated.

James Hill, Captain of the Waxahachie Police Department, testified he gave miranda warnings to appellant on May 31st. On the "statutory warning form", Hill indicated the name of the person warned was "John Doe" because appellant, when asked his name, would answer "over there" and look up at the wall. Appellant

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[17] An assistant district attorney, David Jordan, testified he handled appellant's civil commitment proceeding, and that State law prohibits the civil commitment of a person against whom criminal charges are pending.

[18] Other than taking appellant's confession, Lowrey and appellant mainly discussed politics and sports, of which appellant was especially knowledgeable. Lowrey also stated that after appellant was charged with the present offense, he visited appellant once in the jail, but on a second visit appellant refused to talk to him.

answered in this manner approximately three times, but Hill thought it was unusual only in the sense that appellant was uncooperative.

The defense presented extensive testimony in its case from Dr. Ricardo Schack, a psychiatrist. Schack was appointed by the trial court in the spring of 1988 to examine appellant. Schack's first visit with appellant was April 13, 1988, at the Ellis County Jail, at which time appellant was very agitated, verbally abusive, and experiencing delusions of grandeur.[19] Schack conducted his assessment of appellant in the jail because the jailers recommended appellant not be removed from his cell because he was agitated.

Schack again met with appellant in December of 1988, and, overall, met with appellant five or six times (for a total of about ninety minutes) during which time appellant became less agitated but his behavior did not change significantly. On his last few visits, Schack attempted to converse with appellant but found it very difficult, as talking to appellant was like "a constant argument." During the spring and winter time periods, Schack believed appellant was "mentally impaired" and diagnosed appellant as suffering from manic depressive illness, also known as bipolar disorder, which Schack stated:

> . . . is an illness that is characterized by -- probably the best way to say it is that the brain kind of goes into overdrive. The thinking becomes irrational. The person

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[19] Appellant told Schack he had large amounts of money, was world famous, and that he did not need to talk to him. Schack said appellant also insulted him.

> starts to think irrational thoughts, becomes very impulsive. Can or may become violent. Can or may become rather dangerous.
>
> And what happens, classically, . . . is that the manic depressive is a patient that kind of makes sense and you're nodding as they're talking and all of a sudden you find you are shaking your head because they have stopped making sense. The thinking is too grandiose. They're going to [**23] get rich, they're very wealthy and they have a massive amount of wealth. It's not the classic person who is listening to voices or talking to themselves or anything. But it's more like an illness of degrees.
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> A person shows very impaired judgment, will spend . . . for example, spend [sic] large amount [sic] of money that they don't have. . . . And they will make statements that are very, very grandiose.

Schack stated that, in his opinion, this was a medical condition, but that, as a physician, he "tend[ed] to be very biological."

According to Schack, persons with bipolar disorder may change their behavior patterns daily, and it is possible for a person to be "insane" but yet be alert, aware of his surroundings, intelligent, pleasant, courteous, and able to talk on a number of subjects. In Schack's opinion, on the commission date of this offense, appellant was insane, i.e., he was incapable of knowing

his behavior was wrong. See V.T.C.A. Penal Code § 8.01(a). At the time of trial in this cause, Schack had not examined appellant in approximately seven months.

On cross-examination of Schack, the prosecutor established that Schack's practice was not primarily concerned with treating persons charged with criminal offenses, and in fact Schack preferred not to. Also established was that, during his incarceration, appellant could communicate in complete sentences, knew he was in jail, understood the function of a lawyer but did not want one representing him, lacked respect for the court system, and did not want to talk to Schack during his jail visits. Schack stated that appellant's lack of respect for the courts and his poor judgment in not wanting legal representation could be components of insanity although he recognized "normal people" sometimes exercise poor judgment as well. Appellant's agitation and argumentative personality could also be components of insanity. Schack listed specific components which were indicative of manic depressive disorder, *viz:* pressure, speech, flight of ideas, irritability, lack of need of sleep, impaired judgment, being argumentative, and mood swings. Schack testified each of these was found in appellant to some degree.

Moreover, Schack stated that bipolar disorder is cyclical, meaning "it can be extremely variable, from months to years to weeks, from individual to individual." The disorder may go into remission even without treatment, and when it is subsiding a person so afflicted is capable of following instructions and conforming his behavior to expectations. Appellant appeared reasonably normal during his trial and a previous hearing, according to Schack.

In rebuttal, the State presented testimony from two psychiatrists. The first was Dr. James Grigson who specializes in forensic or legal psychiatry.[20] Grigson, too, was appointed by the court to examine the appellant. Grigson stated he attempted to examine appellant at the Ellis County Jail on November 15, 1988, but he refused the examination after Grigson advised him of his rights, so this jail visit lasted five minutes "at the most". In March of 1989, Grigson only observed appellant for approximately thirty to ninety minutes, as again appellant would not converse with him. Based on these two observations and his review of appellant's hospital records, Grigson concluded appellant was "not suffering from a serious, severe mental disease or defect that would prevent him from knowing the difference between right and wrong[,]" and he saw no signs or symptoms indicating appellant was suffering from bipolar disorder. Grigson elaborated that he had observed persons with bipolar disorder, and stated they are generally severely depressed or suicidal but do not engage in criminal behavior. In examining persons charged with criminal offenses, Grigson found the majority of the persons are either "incompetent because they are street people that have been turned out from state hospitals", are sociopaths who repeatedly commit offenses, or are drug abusers.

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[20] Grigson explained this discipline:

Forensic psychiatry is that branch of medicine primarily involving psychiatry and the law. Most of the work I do is examining individuals charged with criminal offenses to determine their competency to stand trial or their sanity at the time of the alleged offense, or whether or not they represent a continuing threat to society.

On crossexamination, Grigson admitted he had been nicknamed "Dr. Death" by the news media, and that he has been criticized by the American Psychiatric Association, a group that does not believe in the death penalty and does not believe a person's propensity for future dangerousness can be predicted.

The second psychiatrist to testify was Dr. Quynh Nguyen, who is one of three psychiatrists at Terrell State hospital. Nguyen conducted the initial evaluation of appellant when he was brought to the hospital on May 19, 1988, pursuant to a protective custody order. During an initial examination, Nguyen evaluates the client's behavior, mood, affect, rate of speech, and thought content. Nguyen stated appellant very ably described the circumstances which led to his commitment[21] and discussed the presidential candidates, was coherent but talked "around," and denied having any suicidal or homicidal ideas or a history of mental illness or drug abuse.

Nguyen also physically examined appellant, and found no evidence of medical illness or organic dysfunction which would cause physical or mental impairment. Each member of a treatment "team"[22] also evaluated appellant and determined he was not mentally ill and therefore did not recommend he be committed to the hospital. The diagnostic consensus of the treatment team was that appellant "had a mixed personality

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[21] Appellant asserted he had been arrested in Waxahachie for "no reason" other than he had more than $ 1,000 in his possession.

[22] The team consisted of a psychologist, a nurse, a social worker, and a rehabilitation coordinator.

disorder with paranoia, passive, aggressive, antisocial features." Nguyen stated that a personality disorder was not the same as a mental disease or defect, with the difference being that a person with a personality disorder is able to know right from wrong, make his own judgments, and is responsible for his own actions.

At the guilt/innocence phase of trial, the jury arguments from both the State and defense counsel concentrated primarily on the issue of insanity. By its verdict, the jury rejected appellant's claim of insanity at the time of commission of this offense.

At punishment, the State again offered the testimony of Dr. Grigson. Through a hypothetical question based on a person with six prior convictions,[23] a diagnosis of an antisocial personality, and the facts of this offense, Grigson stated in his opinion the hypothetical person would commit future acts of violence and represented a "total threat" to society. The State rested, and the defense again called Dr.Schack to testify. He testified that proper treatment of bipolar disorder would reduce the odds that appellant would commit future acts of dangerousness.

In the *Penry* case, the United States Supreme Court determined our death penalty statute was unconstitutional as applied to Penry because the punishment issues did not provide the jury with a vehicle

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[23] The State introduced into evidence pen packets from the state of Virginia indicating appellant had prior convictions for felonious assault and unlawful wounding, and pen packets from the state of North Carolina showing prior convictions for assault by pointing a gun, communicating threats, and felonious breaking or entering.

to express its "reasoned moral response" to his evidence of mental retardation and childhood abuse, and therefore the jury could not give mitigating effect to that evidence. The Supreme Court agreed with Penry that his mitigating evidence had relevancy to his moral culpability beyond the scope of the special issues, and thus, an instruction "informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty" was necessary. *Penry,* 109 S.Ct. at 2952. Consequently, a constitutional capital sentencing scheme is one that allows the jury to consider relevant mitigating evidence, and provides the jury with a vehicle to express its reasoned moral response to that evidence in arriving at an individualized punishment assessment. *Goss v. State,* 826 S.W.2d 162 (1992).

In *Lackey v. State,* 819 S.W.2d 111 (Tex.Crim.App. 1989) (Opinion on Motion for Rehearing), and *Goss,* this Court elaborated on the necessary criteria for a successful *Penry* claim. Evidence of the quality and character of *"Penry* evidence" is that which is specifically relevant to a defendant's "moral culpability." *Goss,* slip op. at 3. We noted that moral culpability was not related to the lessening of the defendant's guilt for commission of the capital offense, but rather to his "deathworthiness." *Id.* at 3-4. This concept of deathworthiness is best understood as an individualized assessment of the appropriateness of the death penalty, given the offense *and the offender. Lackey,* 819 S.W.2d at 133 (emphasis added).The evidence presented at trial, that which the defendant claims is in fact "mitigating," is relevant to the individualized assessment of the propriety of the death penalty for the offender if there is a nexus between this evidence and the circumstances of the offense which

tends to excuse or explain the commission of the offense, suggesting that particular defendant is less deserving of a death sentence. *Lackey,* 819 S.W.2d at 135, n. 10; *Goss,* slip op. at p. 5; and *Nobles v. State,* 843 S.W.2d 503 (1992). If the jury is presented relevant mitigating evidence, it must be afforded a means by which to give that evidence adequate consideration. The question then becomes whether the Art. 37.071(b) issues are a constitutionally sufficient means.

Appellant, like Penry, was afforded a competency hearing prior to trial on the merits, and also pled not guilty by reason of insanity. As in *Penry,* the jury rejected both claims of incompetency and insanity. The similarities, however, end there as appellant's "mitigating" evidence is qualitatively different than that presented in *Penry,* and therefore is not relevant, *beyond* the scope of the special issues, to the jury's individualized assessment of appellant's moral culpability for this offense.

The evidence presented by appellant as to his mental condition is relevant to the special issues and is fully encompassed thereby. As to the first punishment issue, evidence of any mental impairment suffered by appellant can be given full mitigating effect as it goes to his ability to act deliberately. Schack testified that persons with bipolar disorder may have irrational thoughts or experience impulsive behavior. This evidence is logically related to whether appellant committed this offense deliberately and with a reasonable expectation that death would result. In defense counsel's argument, he framed the issue and ably applied the facts, and, indeed, his argument illustrates the relevancy of the mitigating evidence to the issue. Counsel contended the

evidence showed appellant had never done anything deliberately in his life and was incapable of expectation. He also argued the commission of this offense was not planned, but reactionary and animalistic. The jury could express its reasoned moral response to appellant's claims of mental disease or defect by answering "no" to the first special issue. The relevancy of his mitigating evidence of his mental condition did not exceed the scope of the question.

The same is true as to the second special issue, to-wit: whether appellant would commit future acts of violence and be a continuing threat to society. There was testimony that *if* appellant were suffering from bipolar disorder,[24] proper treatment (of which he had received none since his incarceration) would reduce the odds he would commit future acts of violence; however, there was no testimony of any long term mental illness precluding appellant from conforming his behavior to societal norms. We find appellant's mitigating evidence was encompassed within the jury's consideration of the second punishment issue; that is whether the commission of this offense was an aberration as a result of appellant's alleged mental incapacity, or whether it was indication of appellant's progressively violent behavior and his propensity to commit future acts of violence.

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[24] Both Drs. Grigson and Schack agreed a person with bipolar disorder was treatable. However, in Grigson's opinion, appellant was not suffering from this disease.

The *Penry* analysis under the third special issue, which was submitted in this cause, is much like that under the first special issue. The evidence of appellant's mental condition was directly relevant to whether appellant acted reasonably or was capable of rational thought. In his jury argument, defense counsel implicitly acknowledged the inherent relevancy of this evidence within issue three by stating he was "not even going to argue [] that [issue]" and conceded that appellant's response to the provocation was unreasonable, "but it was done by a person who was insane at the time or at least suffering from some mental disease or defect." If the jury so believed, the third issue provided an adequate means by with the jury could express its reasoned moral response to appellant's mitigating evidence and answer "no" to the issue.

This case was a classic example of "a battle of the experts" and was resolved by the jury's credibility determinations regarding those experts in conjunction with the other evidence presented at trial and each juror's own observations during trial. The jury's rejection of Dr. Schack's opinion regarding appellant's mental condition and defense counsel's theory of this case does not indicate a lack of a vehicle by which the jury could express its reasoned moral response to appellant's mitigating evidence.[25] In this case, the punishment issues encompassed the relevant and mitigating character of appellant's evidence, and allowed the jury & vehicle by which to give effect to that evidence. We hold Art.

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[25] See *Moody v. State*, 827 S.W.2d 875 (1992) (evidence of defendant's commission to mental institution for drug and alcohol treatment can be given its full mitigating effect through the special issues).

37.071(b) was not unconstitutional as applied to appellant in this cause. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

Miller, J.
Delivered: October 14, 1992
En Banc
Benavides, J., concurs in the result.

CHARLES E. MINES, JR. a/k/a CHARLES ANDERSON, Appellant

NO. 70,893 v. Appeal from Ellis County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

The nexus requirement which the majority assigns to Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989) has no basis in Eighth Amendment jurisprudence. Moreover, there is sufficient evidence within the record to demonstrate appellant was entitled to a vehicle allowing the jury to give effect to his mitigating evidence.

I.

I find no basis in Penry, or in its predecessors, for requiring a nexus between a defendant's mitigating evidence and the charged offense. This Court first suggested a nexus requirement in Lackey v. State, 819 S.W.2d 111, 137 n. 10 (Tex.Cr.App. 1991) (Op. on reh'g). Writing for the majority, Judge Campbell assigned the nexus requirement to Justice O'Connor's opinion in California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L. Ed. 2d 934 (1987) (O'Conner, J., concurring). Lackey v. State, 819 S.W.2d at 137 n. 10. Therefore, a review of the relevant Federal and State decisional authority is necessary.

The Texas capital sentencing scheme was first addressed by the supreme court in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L. Ed. 2d 929 (1976). The court held "the constitutionality of the Texas procedures turns on whether the enumerated questions allow

consideration of particularized mitigating factors." Jurek, 428 U.S. at 272, 96 S.Ct. at 2956.[1] Noting that our capital sentencing scheme did not specifically address "mitigating factors," the Supreme Court acknowledged our assurance that we would interpret the "second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show". Id. The Court held our capital sentencing scheme passed constitutional muster because "Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." Id., 428 U.S. at 276, 96 S.Ct. at 2958.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978), the Supreme Court considered the constitutionality of a statute which limited the consideration of mitigating evidence.[2] The Court held:

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[1] The importance of the consideration of mitigating evidence was stressed in *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976), where the Court stated:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation omitted], requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

[2] Ohio Rev.Code Ann. § 2929.04 (B) (1975) provided:

> Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offenses and the history, character, and condition of the

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case [footnote omitted], not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [footnote omitted].

Lockett, 438 U.S. at 604, 98 S.Ct. at 2964-2965 (emphasis in original). The Court further noted "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. 438 U.S. at 605, 98 S.Ct. at 2965.

The Oklahoma Court of Criminal Appeals adopted a view that mitigating evidence was not relevant unless it tended to provide a legal excuse to criminal responsibility. The court held:

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offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

> There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State. [citation omitted]. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.

Eddings v. State, 616 P.2d 1159, 1170 (Okl.Cr. 1980). The United States Supreme Court reversed, holding, "just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 876-877, 71 L. Ed. 2d 1 (1982) (emphasis in original).

In California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L. Ed. 2d 934 (1987), the defendant was convicted of forcible rape and murder. At the punishment stage, the trial judge instructed the jury to consider and weigh all aggravating and mitigating circumstances but cautioned that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" when assessing punishment.[3] Brown, 479 U.S. at 539, 107 S.Ct at 838. Brown was sentenced to death. The California Supreme Court reversed, holding the instruction to disregard any "sympathy factor" raised by the evidence violated the

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[3] All emphasis is supplied by the author unless otherwise indicated.

Eighth Amendment. People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 452, 220 Cal. Rptr. 637 (Cal. 1985). The United States Supreme Court reversed, holding the instruction did not prevent the jury from considering the mitigating evidence but merely warned the jury against basing its verdict entirely on sympathy. Brown, 479 U.S. at 542-543, 107 S.Ct. at 840. In her concurring opinion, Justice O'Connor stated:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual." [citation omitted]. Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.
>
> Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of

> the defendant, and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution. At the same time, the jury instructions-- taken as a whole--must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime.

California v. Brown, 479 U.S. at 545, 107 S.Ct. at 841 (O'Connor, J., concurring).

In Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L. Ed. 2d 155 (1988), the defendant's sole mitigating evidence consisted of a stipulation that his disciplinary record in prison, both before and after the charged offense, was without incident. Franklin requested the jury be instructed to consider any evidence they felt mitigated against the death penalty and that the jury be entitled to return a negative answer to either of the statutory punishment issues in order to avoid the imposition of a sentence of death. The trial judge refused the requested instructions and charged the jury with the first and second punishment issues in Tex. Code Crim. Proc. Ann. art. 37.071(b),[4] and instructed the jury to

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[4] At the time of Franklin's trial, Tex. Code Crim. Proc. Ann. art. 37.071(b) provided:

consider all evidence presented at the guilt/innocence and punishment phases of the trial. Franklin v. Lynaugh, 487 U.S. at 168-170, 108 S.Ct. at 2324-2325. We affirmed. *Franklin v. State,* 693 S.W.2d 420 (Tex.Cr.App. 1985).

Before the Supreme Court, Franklin contended the Eighth Amendment was violated because our capital sentencing scheme prevented the jury's consideration of his mitigating evidence. The Supreme Court rejected Franklin's argument, holding the mitigating evidence of good behavior could be adequately considered within the second statutory punishment issue. Franklin v. Lynaugh, 487 U.S. at 177, 108 S.Ct. at 2329.

In a concurring opinion, Justice O'Connor expressed her concern for the jury's inability to "give effect" to mitigating evidence:

> Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder

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On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

and the defendant's future dangerousness. To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation. In my view, however, this is not such a case. The only mitigating evidence introduced by petitioner was the stipulation that he had no record of disciplinary violations while in prison. It is undisputed that the jury was free to give mitigating effect to this evidence in answering the special verdict question regarding future dangerousness. While it is true that the jury was prevented from giving mitigating effect to the stipulation to the extent that it demonstrated positive character traits other than the ability to exist in prison without endangering jailers or fellow

> inmates, that limitation has no practical or constitutional significance in my view because the stipulation had no relevance to any other aspect of petitioner's character. Nothing in Lockett or Eddings requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense. [citation omitted].

Franklin v. Lynaugh, 487 U.S. at 186, 108 S.Ct. at 2333 (O'Connor, J., concurring).

The following term, in Penry, the Supreme Court was again presented with the issue of whether our capital sentencing scheme violated the Eighth Amendment. At his trial, Penry presented mitigating evidence that he was mentally retarded and he suffered from organic brain damage resulting in poor impulse control and the inability to learn from experience. Penry further presented evidence that he had been seriously abused as a child. In the punishment charge, the trial judge submitted the three statutory punishment issues required under art. 37.071(b), and refused Penry's request for an additional instruction authorizing a grant of mercy based upon Penry's mitigating evidence. We affirmed. Penry v. State, 691 S.W.2d 636 (Tex.Cr.App. 1985).

In Penry, Justice O'Connor, incorporating her concurrences from Brown, and Franklin, and speaking for a majority, reversed, holding that the Texas capital sentencing scheme was unconstitutional as applied

because the jury was not provided a vehicle to give effect to Penry's mitigating evidence. Penry, 492 U.S. at 319-323, 109 S.Ct. at 2947-2949. The Court emphasized at the outset:

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penry v. Lynaugh, 492 U.S. at 319, 109 S.Ct. at 2947.

The Court found Penry's mitigating evidence of mental retardation, organic brain damage and childhood abuse was "beyond the scope of the special issues" and could not be given effect in context of the statutory punishment issues without "appropriate jury instructions" that provided the jury a vehicle to "consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." Penry, 492 U.S. at 317, 109 S.Ct. at 2946 (quoting Lockett, 438 U.S. at 607, 98 S.Ct. at 2966). The Court explained that while the jury could have found that appellant's evidence militated against the imposition of the death penalty, the jury was constrained to answer

each of the statutory punishment issues in the affirmative. Penry, 492 U.S. at 320-325, 109 S.Ct. at 2448-2450. The Supreme Court emphasized:

> In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," [citation omitted] the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Id., 492 U.S. at 328, 109 S.Ct. at 2951 (quoting Woodson, 428 U.S. at 305, 96 S.Ct. at 2991). The Texas capital sentencing scheme was unconstitutional as applied because, while Penry was able to present mitigating evidence, the jury was effectively precluded from giving effect to that mitigating evidence. Id., 492 U.S. at 329, 109 S.Ct. at 2952.

B.

This Court first implied a nexus requirement in Gribble v. State, 808 S.W.2d 65 (Tex.Cr.App. 1990). In Gribble, the defendant introduced evidence of an impoverished and

> insecure childhood in which his mother was institutionalized for a severe mental illness and his father imprisoned for burglary . . . During the first several years of his life, [Gribble] and the other children were shuffled among relatives, never living in one place for very long.

* * *

> After his parents were released from their respective confinements, [Gribble] lived for a time with his mother. She had since divorced his father and remarried, living with her new husband and the children in a shack without running water somewhere in the mountains of Tennessee. Within a few months, appellant's step-father disappeared, leaving his mother pregnant and without food for the two youngest children. Unable to care for her family, appellant's mother spent much of her time in bars, often bringing strange men home at night.

Gribble, 808 S.W.2d at 75. There was evidence that Gribble's mother sexually abused him as a child. Id., 808 S.W.2d at 75. Gribble further introduced expert psychiatric testimony that Gribble's early experiences

> provided a substantial explanation for the appellant's subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother. [The psychoanalyst] concluded that [Gribble] developed a delusive fear of sexual domination, and that throughout his adult life this fear intermittently erupted into acts of violence, which [Gribble] forced upon women that, in his fantasies, he feared they might force upon him.

> Invariably his victims were women with whom he was acquainted on a casual basis and, following his sexual assaults upon them, he customarily acted with incongruous, even bizarre, familiarity, more characteristic of an intimate encounter than a brutal attack.

Id., 808 S.W.2d at 75. The trial judge refused Gribble's requested jury instructions "which would collectively [authorize] the jury, irrespective of its answers to the statutory punishment questions, to decide that he should not be put to death." Id., 808 S.W.2d at 75. We reversed, holding that "all these circumstances [of appellant's childhood were] widely regarded, according to some contemporary social standards, as redeeming personality traits or factors which tend to ameliorate fault." Gribble, 808 S.W.2d at 76 [citation omitted]. Therefore, we concluded that Gribble was denied a vehicle by which the jury could "consider and give effect to" his mitigating evidence.[5]

In Lackey v. State, 819 S.W.2d 111 (Tex.Cr.App. 1991) (Op. on reh'g), the defendant presented evidence of his "disadvantaged background and emotional or mental

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[5] Our research reveals that a defendant has sustained a "Penry" claim before this Court in only six published cases: Gribble v. State, supra; Ramirez v. State, 815 S.W.2d 636 (Tex.Cr.App. 1991); Ex Parte Goodman, 816 S.W.2d 383 (Tex.Cr.App. 1991); Ex Parte McGee, 817 S.W.2d 75 (Tex.Cr.App. 1991); Ex Parte Williams, 833 S.W.2d 150 (Tex.Cr.App. 1992); *and,* Richard v. State, ___S.W.2d___, (Tex.Cr.App. No. 69,896, delivered September 16, 1992). With the exception of Gribble, the defendants in each of the other cases sustained their claim on the basis of an extremely low IQ and/or mental retardation.

problems." Lackey, 819 S.W.2d at 129.[6] Lackey requested, and the trial judge refused, an instruction on mitigating evidence in the punishment charge. We distinguished Lackey's mitigating evidence from that of Penry, as follows:

Although appellant's background and character evidence is relevant to the concerns of special issue two . . . the mitigating evidence in the instant case is otherwise irrelevant to an individualized assessment of the deathworthiness of appellant. Appellant's background evidence [did] not tend to excuse or explain his criminal act as did the evidence presented by *Penry* . . . Furthermore, there [was] little or no *connection* between his background and character evidence and the facts and circumstances of his criminal acts in the instant case.

Lackey, 819 S.W.2d at 134.

For the first time, the court suggested a nexus requirement. In footnote 10, Judge Campbell explained:

> Justice O'Connor seems to further require some nexus between the mitigating evidence and culpability for the crime. See California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (concurring opinion). If moral or personal

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[6] The record revealed Lackey's potentially relevant mitigating evidence to be: (1) a low level of intelligence, shown by extremely substandard IQ test scores and a very poor school record; (2) a turbulent childhood and a troubled relationship with his father; (3) a youthful age (twenty-three) at the time of he offense; (4) voluntary intoxication and "alcoholic black-out" at the time of the offense; and, (5) a history of "periodic drinking" resulting in the inability to control his drinking once initiated. Lackey, 819 S.W.2d at 129.

> culpability is reduced only when the criminal act (murder) is "attributable to a disadvantaged background, or to emotional and mental problems," then mitigating evidence relevant to the defendant's character, background, mental condition, or circumstances of the offense must also be connected with or somehow help to explain or excuse the commission of the offense by this defendant. See e.g., Gribble v. State, 808 S.W.2d 65 (Tex.Cr.App.1990) (Evidence of either actual or imagined sexual abuse of appellant tended to ameliorate fault for appellant's intermittent acts of violence against women. Appellant was thought of as stable, hard working and polite, but his sexual fantasies combined with drugs or alcohol developed into true psychosis resulting in violent behavior.).

Lackey, 819 S.W.2d at 135 n.10. However, Judge Campbell, acknowledged that a nexus requirement was in conflict with the Supreme Court's holdings in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed. 2d 1 (1982). Judge Campbell stated:

> We recognize, however, that a nexus requirement would seem to be in conflict with Lockett v. Ohio [citation omitted], and Eddings v. Oklahoma [citation omitted].
>
> [The] Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor,

> any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
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> * * *
>
> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605, 98 S.Ct. at 2965.); see Hitchcock v. Dugger, 481 U.S. 393, 107, 95 L. Ed. 2d 347, 107 S. Ct. 1821 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

In Eddings, supra, the Court found that the sentencer may not be precluded, as a matter of law, from considering relevant mitigating evidence.

Lackey, 819 S.W.2d at 135, n. 10.

In Richardson v. State, ___ S.W.2d ___ (Tex.Cr.App., No. 68,934, delivered June 12, 1991), a plurality held Richardson was not entitled to a "Penry instruction" because he failed to establish a nexus between the his alleged abusive background and his mental and emotional impairment as an adult. The plurality stated:

> [Appellant] fail[ed] to establish any connection between alleged childhood abuse and its subsequent effect on appellant. There is simply no *Penry* evidence presented by the appellant's

> nexus argument. This Court will not engage in analysis of a theory that is illogical on its face and not supported by the record.

Richardson v. State, slip op. pg. 9. Consequently, appellant's request for a vehicle to allow the jury to consider and give effect to his mitigating evidence was rejected.[7]

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[7] Richardson further argued that his "significant worth" to society as an artist and a poet was mitigating. Evidence was presented attesting to Richardson's artistic talents. The plurality held:

> Rather than attempt to shoehorn appellant's artistic and poetic abilities into the ambit of the second special issue, we choose to confront this issue directly and hold that the appellant's ability to draw pictures and write poems in the context of this case has no mitigating value in the sense that it was relevant to the jury making a "reasoned moral response" in voting on the special issues nor do these abilities have any particular relevance to the appellant's moral culpability outside the special issues. In this particular case, we think that appellant's artistic talents do no more than strike an emotional chord that would cloud the jury's deliberations in reaching a decision.

Richardson v. State, slip op. pgs. 6-7.

Several ministers testified concerning Richardson's "religious devotion." The plurality held:

> The evidence of appellant's religious devotion is Franklin evidence and could be properly addressed by a jury answering issue number two. Appellant's jail house conversions demonstrate nothing more than his ability to adapt to a structured prison environment . . . The jury had ample opportunity to give effect to any mitigating value of appellant's religious zeal when they deliberated on the issue of future dangerousness. [citation omitted]

Richardson v. State, slip op. pg. 11.

In Goss v. State, 826 S.W.2d 162 (Tex.Cr.App. 1992), a plurality of the Court restated the nexus requirement:

> [M]itigating evidence is relevant to the jury's individualized assessment of the propriety of death if there is a nexus between the mitigating evidence and the circumstances surrounding the crime that might, from the viewpoint of society, reduce the defendant's "blameworthiness." In other words, the evidence must tend to excuse or explain the criminal act, so as to make that particular defendant not deserving of death.

Id., 826 S.W.2d at 165 (footnote omitted). Therefore, as the plurality of the Court interpreted the Supreme Court's opinion in Penry, a defendant's mitigating evidence is relevant to a jury's consideration of a defendant's "deathworthiness" only if there is a nexus between the mitigating evidence and the charged offense.

Reviewing Goss' mitigating evidence of good character, a troubled childhood, and intoxication at time of the offense, the plurality held the mitigating evidence introduced did not rise to the level of Penry-type evidence because:

> No testimony was offered by Appellant as to any mental disorder or physiological damage actually suffered by Appellant that would help explain why he "was less morally culpable than defendants who have no such excuse" . . . [citation omitted] . . . None of the evidence presented by

> appellant's witnesses sought to explain the connection between the apparently isolated problems of his childhood and the commission of the crime."

Goss, 826 S.E.2d at 166 [citation omitted]. Therefore, the plurality determined that no vehicle was required in order for the jury to consider and give effect to the mitigating evidence. Id.

For the first time, in Nobles v. State, 843 S.W.2d 503 (1992), a majority of this Court utilized the nexus requirement to dispose of the defendant's "Penry" claim:

> [W]here the evidence presented by defendant's witnesses failed to show a connection between the events they described and the commission of the crime, then that "evidence is not relevant, beyond the scope of the special issues, to the jury's individualized assessment of Appellant's moral culpability for the crime." Goss v. State [826 S.W.2d at 162].
>
> Applying the principle espoused in Goss, the evidence presented in the cause sub judice is likewise not relevant beyond the scope of the special issues. Evidence of appellant's unfortunate childhood was not, without some testimony indicating a nexus between his childhood circumstances and the commission of the crime, helpful to the jury's consideration of the special issues or indicative of a lessened moral blameworthiness.

Nobles v. State, slip op. pg. 3 (emphasis in original).

C.

A majority of this Court has elected to limit the application of Penry to virtually identical scenarios. The vehicle used by the majority to accomplish this narrow application is the requirement of a nexus between the mitigating evidence and the charged offense, resulting in an interpretation of Penry clearly inconsistent with Eighth Amendment jurisprudence. See Lackey, 819 S.W.2d at 135 n. 10 ("We recognize . . . that a nexus requirement would seem to be in conflict with Lockett v. Ohio [citation omitted] and Eddings v. Oklahoma [citation omitted].").

The constitutionality of the Tex. Code Crim. Proc. Ann. art. 37.071 rests on the breadth with which the statute permits a capital jury to consider and give effect to mitigating evidence. In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L. Ed. 2d 929 (1976), the Supreme Court upheld our capital sentencing scheme based upon our assurances that "the sentencing jury [would] have adequate guidance to enable it to perform its sentencing function." Jurek, 428 U.S. at 276, 96 S.Ct. at 2958. With today's opinion, the majority once again makes it clear that the assurances we gave the Supreme Court in Jurek are forgotten. See, Baldree at 220 (Baird, J., dissenting).

The Penry Court did not limit the application of the Eighth Amendment to only mitigating evidence which is connected with the charged offense. By now requiring such a nexus we thwart the intent of Penry because we preclude the jury from giving effect to aspects of a defendant's character and background which, though relevant, may not be connected to the charged offense. The jury, hearing of appellant's manic-depression, might

have believed that appellant's mental illness militated against the sentence of death even without a nexus between the mitigating evidence and the charged offense.[8] Nonetheless, absent a vehicle, the jury was unable to express its reasoned moral response to that evidence.

In my view, the nexus requirement restricts the Eighth Amendment and violates the explicit holding of Penry that a jury must be able to "consider and give effect to *any* mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry, 492 U.S. at 328, 109 S.Ct. at 2951 (emphasis in original). Appellant was entitled to a ehicle permitting the jury to consider and give effect to appellant's mental illness because such mitigating evidence was "beyond the scope" of the punishment issues provided by art. 37.071 and had "practical and constitutional significance" to appellant's moral culpability. Without such a vehicle, our capital sentencing scheme violated the Eighth Amendment and was unconstitutionally applied to appellant.

II.

Assuming, arguendo, that a nexus is required, I believe the majority erroneously distinguishes appellant's mitigating evidence from that in Penry.

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[8] The majority opinion notes that appellant committed the offense three days after he was released from his civil commitment to Terrell State Hospital. Mines, slip op. pg. 11.

In Goss, this Court stated:

> mitigating evidence is relevant to the jury's individualized assessment of the propriety of death if there is a nexus between the mitigating evidence and the circumstances surrounding the crime that might, from the viewpoint of society, reduce the defendant's 'deathworthiness.'

Id., 826 S.W.2d at 165. Moreover, this Court ruled that Goss' mitigating evidence was dissimilar to Penry because it failed to show "any mental disorder or physiological damage actually suffered by Appellant that would help explain why he was less morally culpable than defendants who have no such excuse'. . . ." Goss, 826 S.W.2d at 166 (citation omitted). Therefore, as the majority interprets Penry, to warrant an instruction on the consideration of mitigating evidence outside the scope of the statutory issues, a defendant must demonstrate that: (1) he suffers from a mental disorder or physiological damage (Goss, 826 S.W.2d at 162, and, Gribble, 808 S.W.2d at 75-76); and, (2) a nexus exists between the mitigating evidence and the charged offense (Lackey, 819 S.W.2d at 134; *and,* Nobles, slip op. pg. 3). Appellant has met both prongs.

The majority spends considerable effort discussing Dr. Schack's diagnosis of appellant's possible manic-depression yet fails to recognize the similarity between appellant's mitigating evidence and that in Penry. Mines, slip. op. pgs. 11, 16. Dr. Schack testified that appellant suffered from a mental illness, namely, manic-depression. Manic depression, also known as bipolar disorder, is classified by the American Psychiatric

Association as a mental disorder. Diagnostic and Statistical Manual of Mental Disorders, (3d ed. 1987) (DSM-III-R). The DSM-III-R describes the diagnostic criteria of a Severe Manic Episode of a bipolar disorder: "Almost continual supervision required in order to prevent physical harm to self or to others." Id., at 218.

Dr. Schack stated that individuals suffering from bipolar disorder have poor impulse control. Moreover, bipolar disorder is commonly believed by the psychiatric community to have a biological basis caused by chemical imbalances occurring in the brain. Dr. Schack testified:

> We can now trace it almost to the same degree the brain goes into overdrive. We have biological tests that we can apply that are hard to come by, but you can actually see the brain of a manic depressive. While they are in a manic status, there is an unbelievable activity as compared with a normal person.
>
> And this person will -- will have episodes, relapses, so to speak: They will go on and get better and then they will have another manic episode again maybe years down the road.

Therefore, appellant's mitigating evidence is comparable to that of Penry, and specifically, is evidence of a "mental disorder" which has a physiological (biological) basis. See, Goss v. State, 826 S.W.2d at 162.[9]

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[9] During the punishment phase of the trial, the State also presented evidence concerning appellant's mental illness. In the direct examination of Dr. James P. Grigson, the State proposed the following hypothetical:

Dr. Schack's testimony established a nexus between the appellant's mental illness and the charged

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[THE STATE] Dr. Grigson, assuming that you are considering a person who has been convicted of the offense of . . . that he uses that hammer, also, to attack an eighty-year-old woman with at least eight blows to her head, which causes her death, who then takes property from that home.

And assume further that that person *has been found to have* antisocial personality. Do you have an opinion as to whether there is a probability that that person will commit continuing acts of violence that will constitute a threat to society?

[DR. GRIGSON] Yes, I do.

[THE STATE] And what is that opinion?

[DR. GRIGSON] Absolutely the person you described will commit future acts of violence and does represent a total threat to society.

The Diagnostic and Statistical Manual of Mental Disorders, (3d ed. 1987) (DSM-III-R) defines the mental disorder, Antisocial Personality Disorder, assumed by the State in their hypothetical, as:

The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. . . .

Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty are typical childhood signs. In adulthood the antisocial pattern continues, and may include failure to honor financial obligations, to function as a responsible parent or to plan ahead, and an inability to sustain consistent work behavior. These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest. . . .

People with Antisocial Personality Disorder tend to be irritable and aggressive and to get repeatedly into physical fights and assaults, including spouse- or child-beating . . . Finally, they generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others. After age 30, the more flagrantly antisocial behavior may diminish, particularly serval promiscuity, fighting, and criminality.

offense. Dr. Schack testified that appellant suffered from a bipolar disorder at the time of the charged offense and stated:

> . . . [Manic-depression] is an illness that is characterized by -- probably the best way to say it is that the brain kind of goes into overdrive. The thinking becomes irrational. The person starts to think irrational thoughts, becomes very impulsive. Can or may become violent. Can or may become rather dangerous.

As appellant suffered from the mental illness at the time of the charged offense, which could have caused him to become violent or dangerous, clearly a nexus has been demonstrated. See, Goss v. State, 826 S.W.2d at 166; Penry v. Lynaugh, 492 U.S. at 320, 109 S.Ct. at 2947; *and, Lackey v. State,* 819 S.W.2d at 134.

Our societal disapproval of punishing individuals who are incapable of controlling their behavior, or who are unable to appreciate the wrongfulness of their actions is deep and longstanding.[10] See, Penry v. Lynaugh, 492 U.S. at 330-332, 109 S.Ct. at 2953-2954; Ford v. Wainwright, 477 U.S. 399, 406-410, 106 S.Ct. 2595, 2600-2602, 91 L. Ed. 2d 335 (1986); Ex Parte Jordan, 758 S.W.2d 250, 254 (1988); *and,* 4 W Blackstone, Commentaries 234-25. Appellant's mitigating evidence of mental illness is precisely the type of mitigating evidence which demands an "individualized sentencing determination . . . ." Penry, 492 U.S. at 315-316, 109 S.Ct. at 2945.

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[10] Dr. Schack also testified that while suffering from his illness, appellant was unable to understand the wrongfulness of his conduct.

Finally, appellant's mitigating evidence is comparable to the two-edged sword" evidence in Penry. Appellant's mitigating evidence falls beyond the scope of the second statutory punishment issue requiring a vehicle for the jury to give effect to the evidence. During trial, testimony by both Dr. Schack and Dr. Grigson indicated that bipolar disorder is cyclical and recurs if not properly treated. Untreated, appellant posed a continuing threat to himself or others. Thus, while the evidence tended to diminish appellant's moral culpability for the offense, the cyclical nature of appellant's mental disorder militated toward an affirmative finding of the statutory punishment issues in art. 37.071. Consequently, the jury was confronted with a situation in which they could have believed appellant's culpability was diminished because he committed the offense as a result of his mental illness, and yet, they were constrained to answer the statutory punishment issues affirmatively. Compare, Penry, 492 U.S. at ___, 109 S.Ct. at 2949.

The majority refers to appellant's jury argument concerning the mitigating evidence. Mines, slip op. pgs. 17-18. Argument of counsel cannot be a substitute for a vehicle to give effect to the mitigating evidence. Acknowledging that Penry argued to the jury that his mitigating evidence supported a negative finding to the statutory punishment issues, the Supreme Court then held:

> In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Penry, 492 U.S. at 318, 109 S.Ct. at 2951 (citations omitted).

Furthermore, the majority states:

> This case was a classic example of "a battle of the experts" and was resolved by the jury's credibility determinations regarding those experts in conjunction with the other evidence presented at trial and each juror's own observations during trial.

Mines, slip op. pg. 18. Merely allowing appellant an opportunity to present mitigating evidence does not alleviate the error stemming from the jury's lack of a vehicle to give effect to such evidence. Neither jury argument or the ability to introduce of mitigating evidence substitute for a vehicle allowing an "individualized assessment" of the mitigating evidence.

Finally, the majority attempts to distinguish appellant's mitigating evidence from that presented in Penry.

Appellant, like Penry, was afforded a competency hearing prior to trial on the merits, and also pled not guilty by reason of insanity. As in Penry, the jury rejected both claims of incompetency and insanity. The similarities, however, end there as appellant's "mitigating" evidence is qualitatively different than that presented in Penry, and therefore is not relevant, beyond the scope of the special issues, to the jury's individualized assessment of appellant's moral culpability for this offense.

Mines, slip op. pg. 16 (emphasis in original). However, the majority fails to state how or why the mitigating evidence presented in the instant case "is qualitatively different than that presented in Penry." The majority's inability to demonstrate any differences supports my argument that appellant's mitigating evidence is not "qualitatively different" from Penry, but very *similar*.

Therefore, I believe appellant was entitled to a vehicle for the jury to express its reasoned moral response to appellant's mitigating evidence. Because art. 37.071 failed to provide such a vehicle, the Texas capital sentencing scheme operated in an unconstitutional manner as applied.

For these reasons, I respectfully dissent.

BAIRD, Judge

Clinton and Maloney, JJ., join this opinion.

(Delivered October 14, 1992)

En Banc

FILED: October 4, 1993

CHARLES E. MINES, PETITIONER

V.

TEXAS

NO. 92-9129

SUPREME COURT OF THE UNITED STATES

OPINION

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Johnson* v. *Texas*, 509 U.S. 350 (1993).

FILED: November 30, 1994

MINES, CHARLES E., Appellant

v.

THE STATE OF TEXAS, Appellee

NO. 70,893

COURT OF CRIMINAL APPEALS OF TEXAS

OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

On original submission, we affirmed the judgment of the trial court in this cause. *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1992). The U.S. Supreme Court granted Appellant's petition for writ of certiorari, vacated our judgment, and remanded the cause for consideration in light of their decision in *Johnson v. Texas,* 509 U.S., 113 S.Ct. 2658, 125 L.E.2d 290 (1993). Because we believe that *Johnson* does not change our original disposition of Appellant's *Penry* claims, we once again affirm.

Appellant was convicted of capital murder and sentenced to death. At trial, Appellant introduced evidence of a manic depressive state, also known as bipolar disorder. On original submission, we held that the special issues given during the punishment phase of the trial adequately encompassed the relevant, mitigating characteristics of Appellant's evidence and gave the jury a vehicle by which it could express its reasoned moral response to this evidence. *Mines,* 852 S.W.2d at 952.

Subsequent to our opinion, the U.S. Supreme Court handed down *Johnson, supra.*

The Supreme Court's decision in *Johnson* succeeded its opinion in *Penry v. Lynaugh,* 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). In *Penry,* the petitioner introduced evidence of his mental retardation and abusive childhood. The Supreme Court held that the Texas special issues could not adequately give effect to this evidence. Specifically, the jury instructions only allowed the jury to consider Penry's mitigating evidence as an aggravating factor because it suggested a "yes" answer to future dangerousness. *Id.* at 323. Similarly, the petitioner in *Johnson* argued that the Texas special issues could not] give adequate mitigating effect to the evidence of his youth. The Supreme Court rejected Johnson's claim and held that there was not a reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth through the second special issue. *Johnson,* 113 S.Ct. at 2669. "We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." *Id.*

This Court, in several recent opinions and unpublished orders, has interpreted *Johnson* as being limited to its facts; youth. *See Ex Parte Granviel,* No. 6,620-04 (Tex. Crim. App. October 19, 1994) (unpublished order); *Ex Parte Hawkins,* No. 7,369-07 (Tex. Crim. App. October 12, 1994) (unpublished order); *Zimmerman v. State,* No. 71,106 (Tex. Crim. App. May 31, 1994); *Ex Parte Lucas,* 877 S.W.2d 315 (Tex. Crim. App. 1994). In these cases, several judges on this Court have argued that the Supreme Court's remand in light of *Johnson* must be for some other purpose than to just consider age.

See Ex Parte Lucas, 877 S.W.2d 315 (Clinton, Baird, and Overstreet, JJ. dissenting); *Ex Parte Hawkins, supra* (J. Baird concurring). In fact, the Supreme Court held in *Johnson* that youth could be given proper mitigating effect within the framework of the Texas special issues. Therefore, it would be pointless for the Supreme Court to remand a case for consideration of an issue that they have already decided. Accordingly, *Johnson* must mean something more.

The Supreme Court in *Johnson* stated that "the evidence of Johnson's youth fell outside *Penry's* ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue." *Johnson,* 113 S.Ct. at 2670. Therefore, a more plausible and logical explanation for the Supreme Court's remand in this case and its companions[1] would be to consider whether the mitigating evidence offered in each individual ease was subject to change, like the youth of Johnson, or constant, such as the mental retardation of Penry.

At trial, Mines presented evidence of bipolar disorder. There was testimony that, if Appellant was suffering from bipolar disorder, proper treatment would reduce the odds that he would commit future acts of violence. *Mines,*

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[1] The other cases remanded for reconsideration in light of *Johnson* and decided by this Court were *Ex Parte Granviel,* No. 6,620-04 (Tex. Crim. App. October 19, 1994); *Ex Parte Hawkins,* No. 7,369-07 (Tex. Crim. App. October 12, 1994); *Zimmerman v. Texas,* No. 71,106 (Tex. Crim. App. May 31, 1994); *Earhart v. Texas,* 877 S.W.2d 759 (Tex. Crim. App. 1994); and *Ex Parte Lucas,* 877 S.W.2d 315 (Tex. Crim. App. 1994)

852 S.W.2d at 951. There was no testimony of any long term mental illness that precluded him from conforming his behavior to societal norms, as in *Penry.* To the contrary, the testimony showed that when bipolar disorder is in remission, with or without treatment, a person is capable of conforming his behavior to societal expectations.852 S.W.2d at 949. This mitigating evidence is not constant, as in *Penry,* and is subject to change. Consequently, the jury could have adequately given mitigating effect to this evidence through the second special issue. Furthermore, like *Johnson,* the jury was instructed that it could consider all of the evidence in either phase of the trial when assessing punishment. We fail to see how the jury was foreclosed from considering the mitigating aspects of Appellant's mental illness, if any, in its deliberations on punishment. The mitigating aspects of bipolar disorder were well within the effective reach of the jury.[2] Therefore, a special instruction concerning Appellant's mental illness was not warranted during the punishment phase of the case at bar.

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[2] Although a "nexus" issue is not within the immediate purview of a *Johnson* remand, we further note that Appellant has failed to establish a nexus between his illness and "the circumstances of the offense which tends to excuse or explain the commission of the offense, suggesting that [he] is less deserving of a death sentence." *Mines,* 852 S.W.2d at 951. *See also Nobles v. State,* 843 S.W.2d 503, 506 (Tex. Crim. App. 1992).

We hold that our original opinion is unaffected by the Supreme Court's opinion in *Johnson*. Therefore, we reaffirm our original holding and the judgment of the trial court.

Miller, J.

Delivered: November 30, 1994

En Banc

CHARLES E. MINES, Appellant

NO. 70,893 v. Appeal from ELLIS County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

This is but one of seven cases where the Supreme Court granted certiorari, vacated our judgment, and remanded the case for consideration in light of *Johnson v. Texas*, 509 U.S.___, 125 L. Ed. 2d 290, 113 S.Ct. 2658 (1993). *See also, Hawkins v. Texas*, ____U.S. ____, 113 S.Ct. 3029-3030 (1993); *Earhart v. Texas*, ___ U.S.____, 113 S.Ct. 3026 (1993); *Granviel v. Texas*, ___ U.S.___, 113 S.Ct. 3027 (1993); *Lucas v. Texas*, ____ U.S. ____, 113 S.Ct. 3029 (1993); *Richardson v. Texas*, ___ U.S. _____, 113 S.Ct. 3026 (1993); and, *Zimmerman v. Texas*, ____ U.S. ____, 114 S.Ct. 374 [(1993)].[1] The Supreme Court explained such an order in *Henry v. City of Rock Hill*, 376 U.S. 776, 84 S.Ct. 1042, 12 L. Ed. 2d 79 (1964):

> When this case was last before us, we granted certiorari, vacated the judgment ... and remanded the case ... "for further

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[1] We have complied with the Supreme Court's order and denied relief in each case. See, *Earhart v. State*, 877 S.W.2d 759 (Tex.Cr.App. 1994) (On remand); *Ex parte Lucas*, 877 S.W.2d 315 (Tex.Cr.App. 1994) (On remand); *Zimmerman v. State*, 881 S.W.2d 360 (Tex.Cr.App. 1994) (On remand) *Richardson v. State*, ___ S.W.2d ___, 1994 Tex. Crim. App. LEXIS 66 (Tex.Cr.App. No. 68,934 delivered June 1, 1994) (On remand); and, *Hawkins v. State*, No. 7,369-07 (Tex.Cr.App. delivered October 12, 1994) (On remand) (not published)

> consideration in light of *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L. Ed. 2d 697." That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration.
>
> * * *
>
> The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, -- indicate that we found Edwards sufficiently analogous and, perhaps, decisive to compel re-examination of the case.

Id, 376 U.S. at 76-77, 84 S.Ct. at 1042-1043 (citations omitted). Consequently, the Supreme Court's order remanding this case suggests our opinion on original submission was erroneous.

I.

In 1975, our capital sentencing scheme passed constitutional muster. In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L. Ed. 2d 929 (1976), the Supreme Court held:

> ... Texas has provided a means to promote the evenhanded, rational and consistent imposition of death sentences under law. Because this system serves to assure that

> sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

Id., 428 U.S. at 276, 96 S.Ct. at 2958. We have rejected many constitutional challenges to our capital sentencing scheme since Jurek. *See e.g., Stewart v. State*, 686 S.W.2d 118 (Tex.Cr.App. 1984), *cert. denied*, 474 U.S. 866, 106 S.Ct. 190, 88 L. Ed. 2d 159 (1985); *Phillips v. State*, 701 S.W.2d 875 (Tex.Cr.App. 1985), *cert denied*, 477 U.S. 909, 106 S.Ct. 3285, 91 L. Ed. 2d 574 (1986); *Fierro v. State*, 706 S.W.2d 310 (Tex.Cr.App. 1986); *Demouchette v. State*, 731 S.W.2d 75 (Tex.Cr.App. 1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3197, 96 L. Ed. 2d 685 (1987); and, *Cordova v. State*, 733 S.W.2d 175 (Tex.Cr.App. 1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2915, 101 L. Ed. 2d 946 (1988).

However, thirteen years after Jurek, we learned that our capital sentencing scheme may be unconstitutionally applied. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989). Penry presented mitigating evidence that he was mentally retarded, suffered organic brain damage, and suffered physical and mental abuse as a child. *Id.*, 492 U.S. at 309, 109 S.Ct. at 2941. The Supreme Court held our statutory punishment issues did not allow the jury to give effect to this mitigating evidence. *Id.*, 492 U.S. at 323, 109 S.Ct. 2949.

Four years later, in *Graham v. Collins*, ___U.S.___, 113 S.Ct. 892 (1993), the Supreme Court stated:

> We do not read Penry as effecting a sea change in this Court's view of the constitutionality of the former Texas death

> penalty statute; it does not broadly suggest the invalidity of the special issue framework.

Id., ___U.S. at ___, 113 S.Ct. at 901 (emphasis in original).

Also in 1993, the Supreme Court considered whether mitigating evidence of youth could be considered and given effect within our capital sentencing scheme. *Johnson*, 125 L. Ed. 2d 290, 509 U.S., 113 S.Ct. 2658 (1993). Recognizing that evidence of youth can be mitigating,[2] the Court nonetheless held the jury was not precluded from considering and giving effect to this evidence:

> ... We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination.

Id. However, the Johnson Court specifically stated: "Penry remains the law and must be given a fair reading." *Id.*, 113 U.S. 2670.

II.

This and the aforementioned cases were remanded to this Court for consideration in light of Johnson. On one such remand, *Ex parte Lucas*, 877 S.W.2d 315 (Tex.Cr.App. 1994), a majority of this Court held:

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[2] The Court recognized that maturity often has a positive effect upon the "impetuousness and recklessness that may dominate in younger years," *Johnson*, ___U.S. at___, 113 S.Ct. at 2669.

> In our initial review ... we held that the potentially mitigating evidence offered ... did not warrant a Penry-type instruction ... We do not believe that Johnson changes that holding. The record shows ... [Lucas] was 43 years old when he committed the instant offense. The petitioner in Johnson ... was 19 when he committed his offense. We believe, therefore, that youth is not a factor in the instant case.

Id., 877 S.W.2d at 317.[3] In *Zimmerman v. State*, 881 S.W.2d 360, 363 (Tex.Cr.App. 1994), a majority of this Court reaffirmed its interpretation of Johnson as being limited to evidence of a defendant's youth. Insofar as a majority of this Court has concluded that Johnson is a decision with a limited holding that mitigating evidence of youth can be considered and given effect within our capital sentencing scheme, the doctrine of stare decisis controls. *Ex parte Porter*, 827 S.W.2d 324, 329 (Tex.Cr.App. 1992) (Baird, J., dissenting); and,

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[3] In a dissenting opinion which I joined, Judge Overstreet, expressed the belief that "there must be something within Johnson aside from the age of the defendant which merits such 'further consideration.'" *Lucas*, 877 S.W.2d at 318 (Overstreet, J., dissenting). The dissent believed Johnson was distinguished from Penry because "the ill effects of youth that a defendant may experience are subject to change and, as a result are readily comprehended as a mitigating factor in consideration of the second special issue." Lucas, 877 S.W.2d at 318 (citing *Johnson*, ___ U.S. at ___, 113 S.Ct. at 2670). However, if the mitigating evidence was permanent, i.e., not subject to change, such as Penry's mental illness, then the Lucas dissent would hold a Penry instruction was required. In light of this Court's treatment of *Lucas, supra*, and *Zimmerman v. State*, 881 S.W.2d 360, however, it is apparent that a majority of this court has rejected this interpretation of Johnson.

Richardson v. State, 879 S.W.2d 874, 885 (Tex.Cr.App. 1993) (Baird, J., dissenting).

The record in the instant case reflects that appellant was between 39 and 46 years old when he committed the offense.[4] I do not believe that Johnson, where the petitioner was nineteen at the time he committed his offense, changes our holding on original submission. Consequently, youth was not a factor in the instant case and appellant is not entitled to relief. *Lucas*, 877 S.W.2d at 317; and, *Zimmerman*, 881 S.W.2d at 362. The plurality's subtle attempt to adopt the dissent in Lucas is not supported by our prior decisions. Plurality Op., ___ S.W.2d at ___, slip op. pg. 2. Indeed, were that the position of this Court, Lucas and Zimmerman would have been entitled to relief.

III.

While one could argue that our treatment of these cases on remand has been a less than fair reading of Penry, it must be noted that the same complaint was leveled at and rejected by a majority of the Supreme Court in its subsequent interpretations of Penry. *See*, *Johnson*, ___ U.S. at ___, 113 S.Ct. at 2678 (O'Connor, J., dissenting); and, *Graham*, ___ U.S. at ___, 113 S.Ct. at 920-921 (Souter, J., dissenting).

The aforementioned Supreme Court cases shed little light on the correct application of Penry. Although we have asked the Court for guidance, none has been

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[4] Although there was no testimony at trial concerning appellant's age, dated fingerprint records within the North Carolina and Virginia pen packets, which were admitted at trial, placed appellant, age at the time of the offense, at 39 and 46 years of age respectively.

forthcoming. *Staley v. State*, 887 S.W.2d 885, ___, slip op. pg. 9 (Tex.Cr.App. No. 71,274, delivered April 27, 1994) (Baird, Overstreet and Maloney, JJ., concurring); *Richardson*, 879 S.W.2d at 885; and, *Earhart*, 877 S.W.2d at 764. The Supreme Court's holdings in Penry, Graham and Johnson do not provide an analytical framework to determine when our capital sentencing scheme fails to allow the jury to consider and give effect to mitigating evidence nor do they instruct us as to what vehicle is required when the mitigating evidence is not relevant to or falls beyond the scope of the statutory punishment issues.

Because the development of our Penry jurisprudence has been without the benefit of guidance from the Supreme Court, our efforts to apply Penry have not been easy and this issue has often divided the Court. *See e.g., Ex parte Goodman*, 816 S.W.2d 383, 386 (Tex.Cr.App. 1991); *Ex parte Ellis*, 810 S.W.2d 208, 213 (Tex.Cr.App. 1991); *Ex parte Baldree*, 810 S.W.2d 213, 217 (Tex.Cr.App. 1991); *Black v. State*, 816 S.W.2d 350, 367-379 (Tex.Cr.App. 1991); *Lackey v. State*, 816 S.W.2d 392, 401-407 (Tex.Cr.App. 1991); *Ex parte Herrera*, 819 S.W.2d 528, 528-533 (Tex.Cr.App. 1991); and, *Mines v. State*, 852 S.W.2d 941, 952 (Tex.Cr.App. 1992). Nevertheless, since Penry, we have reviewed many types of mitigating evidence and we have developed an analytical framework in which to apply that decision.[5]

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[5] We have held most types of mitigating evidence can be considered and given effect within the scope of art. 37.071. *See e.g., Ex parte Goodman*, 816 S.W.2d 383 (Tex.Cr.App. 1991) (possible brain damage, violent family background and growing up in poverty); *James v. State*, 805 S.W.2d 415 (Tex.Cr.App. 1990) (voluntary intoxication); *Ex parte Ellis*, 810 S.W.2d 208 (Tex.Cr.App. 1991) (drug abuse, suicide attempt, and lack of education); *Ex parte*

However, we determined that an additional vehicle may be required when the defendant presents evidence of: 1) mental retardation, *Ex parte Goodman, supra*; *Ramirez v. State*, 815 S.W.2d 636 (Tex.Cr.App. 1991); and, *Richard v. State*, 842 S.W.2d 279 (Tex.Cr.App. 1992); 2) mental illness, *Gribble v. State*, 808 S.W.2d 65, 76 (Tex.Cr.App. 1990); and, 3) the jury's inability to consider and give effect to evidence of provocation by a second victim in a prosecution under Tex. Penal Code Ann. § 19.03(a)(6). *First v. State*, 846 S.W.2d 836, 842 (Tex.Cr.App. 1992).

Further, we approved two vehicles to be used when Penry evidence is present. *See*, *Fuller v. State*, 829 S.W.2d 191 (Tex.Cr.App. 1992) (the "nullification instruction"); and, *State v. McPherson*, 851 S.W.2d 846 (Tex.Cr.App. 1992) (an additional punishment issue).

On original submission of this case, *Mines v. State*, 852 S.W.2d at 951, we adopted a "nexus" requirement, requiring the defendant to establish a connection between his mitigating evidence and the capital offense which tends to excuse or explain his commission of the offense.[6]

Baldree, 810 S.W.2d 213 (Tex.Cr.App. 1991) (being a good and loving child, critical illness as child, voluntary service, and good character evidence); *Lewis v. State*, 815 S.W.2d 560 (Tex.Cr.App. 1991) (abusive childhood and remorse); *Black v. State*, 816 S.W.2d 350 (Tex.Cr.App. 1991) (prior military service, being a boy scout, and general good character evidence); and, *Ex parte Herrera*, 819 S.W.2d 528 (Tex.Cr.App. 1991) (mental instability, supportive family, police brutality after arrest and remorse).

[6] However, we do not required proof of a nexus when the defendant presents evidence of mental retardation. *See*, *Richard v. State*, 842 S.W.2d 279, 283 (Tex.Cr.App. 1992); *Ex parte Goodman*,

While I continue to believe that the requirement of a nexus is unsupported by Penry and runs afoul of capital punishment jurisprudence, *Mines*, 852 S.W.2d at 952-960 (Baird, J., dissenting, Clinton and Maloney, JJ., join), a majority of this Court has adopted the nexus requirement and so it has become settled law. *See e.g., Richardson*, 879 S.W.2d at 884; *Earhart*, 877 S.W.2d at 765-767; *Gunter v. State*, 858 S.W.2d 430, 447 (Tex.Cr.App. 1993); *Satterwhite v. State*, 858 S.W 2d 412, 428 (Tex.Cr.App. 1993); *Muniz v. State*, 851 S.W.2d 238, 256 (Tex.Cr.App. 1993); *Nobles v. State*, 843 S.W.2d 503, 506 (Tex.Cr.App. 1991); *Goss v. State*, 826 S.W.2d 162 (Tex.Cr.App. 1992); and, *Lackey v. State*, 819 S.W.2d 111, 134 (Tex.Cr.App. 1991). Accordingly, our requirement of a nexus in cases where the defendant asserts a Penry claim is supported by stare decisis and must be followed unless and until we are directed otherwise by the Supreme Court. *See, Plurality Op.*, ___ S.W.2d at ___, slip op. pg. 3, n. 2.

IV.

The Supreme Court's order in the instant case and the explanation of such an order in Henry suggest that we erred in our application of Penry. Nevertheless, stare decisis compels me to conclude that appellant is not entitled to relief. A majority of this Court has concluded that Johnson is a decision with a limited holding that mitigating evidence of youth can be considered and given effect within our capital sentencing scheme. *Zimmerman*, 881 S.W.2d at 362; and, *Lucas*, 877 S.W.2d at 317. Because we have no statement from the Supreme Court

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816 S.W.2d 383, 386 (Tex.Cr.App. 1991); and, *Ramirez v. State*, 815 S.W.2d 636, 656 (Tex.Cr.App. 1991).

indicating otherwise, I am bound to follow the established precedent of this Court.

Today, Texas has almost four hundred inmates awaiting execution. If this Court has misconstrued the relevant authority addressing our capital sentencing scheme, it is incumbent upon the Supreme Court to clarify the error.

With these comments, I join the judgment of the Court.

BAIRD, Judge

Overstreet, J., joins this opinion.

(Delivered November 30, 1994)

En Banc

DISSENT BY: MALONEY

DISSENT

DISSENTING OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

Mental disease, although it may not be severe enough to render one incapable of knowing right from wrong and thus excuse criminal culpability, is nevertheless a fact that might be both aggravating and/or mitigating in nature in the eyes of the jurors, particularly when it is chronic. *See Diagnostic and Statistical Manual* 225-26 (American Psychiatric Association 3rd ed. 1987). Without a Penry instruction, in most situations it will be considered by the jury as evidence of dangerousness. *See Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). I respectfully dissent.

MALONEY, J.
Delivered November 30, 1994

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

CHARLES E. MINES, JR.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX
VOLUME II

GREG ABBOTT
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 72,906

EX PARTE CHARLES E. MINES, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM ELLIS COUNTY

WOMACK, J. delivered the opinion of the Court, in which PRESIDING JUDGE McCORMICK, MANSFIELD, KELLER, HOLLAND, and KEASLER, JJ., joined. JUDGE JOHNSON delivered a dissenting opinion in which MEYERS and PRICE, JJ., joined.

The issue in this case is whether a person who is sentenced to the punishment of death must be competent to assist his counsel in filing an application for habeas corpus relief. We find no such requirement in the law.

The applicant was convicted of capital murder and sentenced to death in June, 1989. The judgment has been affirmed on appeal.[1] Now he seeks habeas

[1] *Mines v. State*, 852 S.W.2d 941 (Tex. Cr. App. 1992), *vacated, Mines v. Texas*, 510 U.S. 802, 126 L. Ed. 2d 13, 114 S. Ct. 42 (1993), *affirmed, Mines v. State*, 888 S.W.2d 816 (Tex. Cr. App. 1994), *cert. denied*, 514 U.S. 1117, 131 L. Ed. 2d 866, 115 S. Ct. 1978 (1995).

corpus relief, with an application that contains 68 allegations. The trial court found no issues of fact that required resolution, and it recommended the denial of habeas relief. We ordered the case filed and set for consideration of one allegation, that the applicant is incompetent to assist on the writ of habeas corpus. The question before us is one of law; there is no finding that the applicant is in fact incompetent to assist his habeas counsel.[2]

The applicant argues that: (1) an applicant must be competent to assist counsel with the application, (2) counsel is rendered ineffective if the applicant is incompetent, and (3) an applicant is entitled to a full adversarial trial by jury for a competency determination. To support his arguments he invokes several constitutional provisions and statutes, which we shall consider in order.

I. Statutory considerations.

The Texas Constitution authorizes -- indeed, requires -- the legislature to devise an effectual system of habeas corpus.[3] Without such legislation, the constitutional authority of this Court to issue writs of habeas corpus is not greater than that enjoyed by

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[2] His counsel say they have been unable to get information from the applicant. The State replies that the applicant is uncooperative, not incompetent.

[3] "The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." TEX. CONST. art. I, § 12.

courts at common law.[4] Since 1967, statutes have provided procedures for writs of habeas corpus after conviction. [HN1] Although the Code of Criminal Procedure provides detailed standards and procedures for determining a defendant's incompetency to be tried [5] and a defendant's competence to be put to death,[6] it contains no mention of a defendant's incompetence to bring habeas corpus proceedings. The inaction of the legislature is a significant indication that competence to assist counsel is not required in habeas corpus proceedings.

The habeas corpus statutes contain some positive indications that it is not necessary that an applicant be able to confer with counsel in the way that a defendant confers with trial counsel. A petition for the writ of habeas corpus may be signed and presented by any person other than the applicant.[7] Counsel may

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[4] *See Ex parte Davis*, 947 S.W.2d 216, 225 (Tex. Cr. App. 1996). The Texas Constitution expressly empowers the legislature to regulate the exercise of this Court's original habeas corpus jurisdiction. *Id.* at 224 (quoting TEX. CONST. art. V, § 5: "Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus ...").

This citation to *Davis* is to an opinion of the Court, although it was not the lead opinion. *See Ex parte Smith*, 977 S.W.2d 610, 611 n.4 (Tex. Cr. App. 1998).

[5] *See* TEX. CODE CRIM. PROC. art. 46.02.

[6] *See id.* art. 46.04.

[7] Either the party for whose relief the writ is intended, or any other person for him, may present a petition to the proper

consent to hearing of the application without the applicant's being present.[8]

The applicant would have us infer a requirement of mental competence from Article 11.071 of the Code of Criminal Procedure. That article requires that a habeas corpus applicant who seeks relief from a judgment imposing a penalty of death shall be represented by competent counsel unless the applicant has elected to proceed pro se.[9] In this context "competent" refers to an attorney's qualifications and abilities. The article further requires counsel to investigate expeditiously the factual and legal grounds for an application.[10]

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authority for the purpose of obtaining relief." TEX. CODE CRIM. PROC. art. 11.11. "The word applicant, as used in this Chapter, refers to the person for whose relief the writ is asked, though the petition may be signed and presented by any other person." *Id.* art. 11.12.

[8] "The person on whom the writ is served shall bring before the judge the person in his custody, or under his restraint, unless it be made to appear that by reason of sickness he cannot be removed; in which case, another day may be appointed by the judge or court for hearing the cause, and for the production of the person confined; or the application may be heard and decided without the production of the person detained, by the consent of his counsel." *Id.* art. 11.31.

[9] "An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary." *Id.* art. 11.071, § 2(a).

[10] "On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing

The applicant notes that article 11.071 requires that if an applicant wants to waive counsel in habeas proceedings, his waiver must be intelligent and voluntary. He argues that this assumes a level of mental competence that is on par with the standard for self-representation at trial under the federal and state constitutions. He argues, but does not explain why, this standard should apply to habeas proceedings when an applicant has not waived the right to counsel.

The competency standard for pleading guilty or waiving the right to counsel at a criminal trial is not higher than the competency standard for standing trial; "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.[11] If we assume that this standard applies to a habeas-corpus applicant's waiver of the right to counsel (a question that is not before us today), we are not justified in assuming that an applicant must have the same level of competence when he does *not* waive the right to counsel. A requirement that waiving counsel in habeas proceedings must be a knowing and voluntary decision, does not mean that the legislature intended to incorporate the requirement that an applicant be competent in retaining the statutory right to counsel in habeas proceedings.

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of an application for a writ of habeas corpus." *Id.* § 3(a).

[11] *Godinez v. Moran*, 509 U.S. 389, 399, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993).

The applicant notes that in some jurisdiction an accused must be competent to be extradited. This is not the law in Texas.[12]

II. Constitutional considerations.

The United States Constitution guaranties a person's right to counsel in criminal prosecutions.[13] It does not provide a right to counsel in state habeas corpus proceedings.

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, *see Johnson v. Avery*, 393 U.S. 483, 488, 21 L. Ed. 2d 718, 89 S. Ct. 747, (1969), and we decline to so hold today. [HN5] Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. *Wainwright v. Torna*, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982); *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S.

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[12] Texas law requires only that people facing extradition be afforded the right to counsel. *See* TEX. CODE CRIM. PROC. art. 51.13 § 10; *Ex parte Taylor*, 531 S.W.2d 333, 334 (Tex. Cr. App. 1975).

[13] "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. CONST. amend. VI. The identical right is guarantied in state prosecutions through the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963).

> Ct. 2437 (1974). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.[14]

This holding applies in capital cases as well as in others.[15] "Consequently, a petition cannot claim constitutionally ineffective assistance of counsel in such proceedings."[16]

Similarly, the Texas Constitution[17] provides no right to counsel in post-conviction habeas corpus proceedings.[18]

The reason why the right to counsel in a criminal prosecution does not extend to all post-trial proceedings

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[14] *Finley v. Pennsylvania*, 481 U.S. 551, 555 (1987).

[15] *See Murray v. Giarratano*, 492 U.S. 1 (1989) (applying the rule to capital cases).

[16] *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). "*See Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance)." *Ibid.*

[17] In all criminal prosecutions, the accused...shall have the right of being heard by himself or counsel..." TEX. CONST. art. I, § 10.

[18] *See Davis*, 947 S.W.2d at 229.

lies in the difference between the trial and post-trial stages of the process.

> At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."
>
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's

prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.[19]

Likewise, a state is not required to provide post-conviction remedy.

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceedings itself, and it is in fact considered to be a civil in nature. *See Fay v. Noia*, 372 U.S. 391, 423-24 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide his avenue of relief, *cf. United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion), and when they do, the fundamental fairness

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[19] *Moffitt*, 417 U.S. at 610-11 (citations omitted).

> mandated by the Due Process Clause does not require that the State supply a lawyer as well.[20]

The Texas Constitution does not guaranty a right to habeas corpus relief that is broader than that available at common law, which does not include cases such as applicant's.[21]

These holdings foreclose the applicant's argument that a habeas-corpus applicant's competence to consult with counsel is required by the provisions for right to counsel in the state and federal constitutions.

Other constitutional provisions must be considered. The requirement that a criminal defendant be competent to consult with counsel is not based only on the right to the assistance of counsel. Another right is the presumption of innocence, which is guarantied by the Due Process Clause.[22] Requiring that a criminal defendant be competent to be tried preserves the presumption of innocence by ensuring that a criminal defendant can help the defense attorney defend the client.[23] A defendant must be able to assist trial

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[20] *Finley*, 481 U.S. at 56-57. "The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, *see Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction." *MacCollom*, 426 U.S. at 323 (plurality opinion).

[21] *Davis*, 947 S.W.2d at 225.

[22] *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

[23] *Moffitt*, 417 U.S. at 610.

counsel because often the defendant possesses the only information that may cast doubt on the State's case. If a defendant is incompetent, we cannot be sure that the defendant can communicate to counsel the facts necessary to mount an effective defense. It also has been said that the requirement of competence is a byproduct of the rule requiring that a defendant be present at trial, since a trial of an incompetent defendant is virtually a trial *in absentia*.[24] The right to be present is largely based on the Confrontation Clause, although it also has a due process component.[25]

But an applicant for the post-conviction writ of habeas corpus enjoys neither a presumption of innocence[26] nor a constitutional right to be present at a hearing.[27] These constitutional rights that require competence to assist trial counsel do not support a requirement that an applicant be competent to assist habeas counsel.

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[24] *See Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[25] *See United States v. Gagnon*, 470 U.S. 522 (1985).

[26] *See Moffitt*, 417 U.S. at 610. The applicant is actually in the opposite position. "In a habeas corpus proceeding, there exists a presumption of regularity of the judgment which can only be overcome by the petitioner['s] showing that there is substantial evidence to the contrary." *Ex parte Young*, 479 S.W.2d 45, 47 (Tex. Cr. App. 1972).

[27] *State v. Basile*, 942 S.W.2d 342 (Mo. 1997) (motion for post-conviction relief is civil proceeding and therefore there is no due process right to be present); *State v. Leisure*, 828 S.W.2d 872 (Mo. 1989) (for same reason there is no right under Confrontation Clause to be present).

Another reason for requiring competency at trial is that the defendant must make significant choices that require the advice of counsel but that are ultimately decided by the defendant.[28] The defendant must be competent to decide whether to invoke or to waive such personal constitutional rights.[29] Such choices are not required in post-trial proceedings such as this.[30]

The applicant says that he would be subjected to cruel and unusual punishment if he were put to death when he was not competent to assist his habeas counsel. Cruel and unusual punishments are forbidden by the federal and state constitutions.[31] The prohibition

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[28] "It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate." *Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983) (citations omitted).

[29] *Godinez v. Moran*, 509 U.S. 389, 398, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993).

[30] In this proceeding there is no plea of guilty, trial by jury, or appeal. There is a choice to testify in the sense that any civil litigant has such a choice, but the decision does not inevitably involve the waiver of the right against self-incrimination as the defendant's choice to testify at the criminal trial does.

[31] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." TEX.

of cruel and unusual punishments in the Eighth Amendment to the Constitution of the United States prevents a State from carrying out a sentence of death upon a prisoner who is insane.[32] "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."[33]

The applicant does not claim that he is incompetent to be put to death. He does not explain why the requirement of sanity at the time the sentence is executed implies a requirement of competence to assist counsel in habeas corpus litigation. The procedures are not similar, the roles of the convicted person are not the same, and the standard for competence to be put to death is not the same as the standard the applicant proposes for competence in habeas corpus proceedings. The applicant does not claim that habeas corpus proceedings would subject him to fear and pain without comfort of understanding, or that counsel's filing a habeas-corpus application without his assistance would constitute the barbarity of exacting mindless vengeance.

CONST. art. I, § 13.

[32] Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986).

[33] *Id.* at 410.

In light of the absence of legislative action, the statutory context, and the differences in the nature of the rights and procedures at trial and in post-conviction proceedings, we find no justification in inferring a statutory requirement that the applicant be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent for trial.

III. Conclusion

As the Supreme Court of California said, in a case in which it refused to stay an appeal because the appellant was incompetent:

> Arguably the situation is different regarding potential habeas corpus challenges, which may be based on matters outside the appellate record. We cannot rule on the question in a vacuum. We suspect that most, if not all, potential challenges in a habeas corpus proceeding could be made without additional input from defendant. Current defense counsel have access to the appellate record, to investigators, to trial counsel's case files, and to the knowledge and experience of trial counsel. ... Defendant's alleged incompetency might be grounds for the untimely raising of an issue if it could not have been raised earlier because of that incompetency. The prohibition against executing an insane person provides additional protection for someone who, because of incompetency, was unable to

pursue a meritorious challenge to the judgment.

For these reasons, current counsel can and should seek to challenge the judgment even if defendant is currently incompetent. If, in a petition for a writ of habeas corpus, counsel make a specific showing why specified contentions require defendant's ability to cooperate, and why the necessary information cannot be obtained from other sources, we will consider the question at that time. Additionally, if a prima facie showing is made on any contention, and an evidentiary hearing is ordered, defendant may raise the question of his competence to participate in the evidentiary hearing at that time.[34]

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[34] *People v. Kelly*, 1 Cal. 4th 495, 546-47, 822 P.2d 385, 414, *cert. denied*, 506 U.S. 881, 113 S. Ct. 232, 121 L. Ed. 2d 168 (1992). *See also Fisher v. State*, 845 P.2d 1272, 1277 (Okla. Cr. App. 1992) (if after the disposition of his first post-conviction attack, an applicant is found to have been incompetent to assist his attorney and is found to possess knowledge of facts entitling him to relief that he could not share with his attorney due to his incompetence, he may bring a subsequent post-conviction attack). *Cf. Calderon v. U.S. Dist. Court for Cent. Dist. Cal.*, 163 F.3d 530, 541 (9th Cir. 1998) (alleged mental incompetency justifies equitable tolling of time limit imposed by the federal habeas corpus statute for a reasonable time after the district court makes a competency determination). *But see Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997) (applying trial standard of competency); *People v. Owens*, 139 Ill. 2d 351, 564 N.E.2d 1184, 1136, 151 Ill. Dec. 522 (Ill. 1990) (same); *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994) (same).

The relief requested is denied.

En banc.
Delivered September 13, 2000.
Publish.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 72,906

EX PARTE CHARLES E MINES, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM ELLIS COUNTY

Johnson, J., *filed a dissenting opinion, in which* Meyers *and* Price, J.J., *joined.*

DISSENTING OPINION

I respectfully dissent. The majority concludes that TEX. CODE CRIM. PROC. art. 11.07 does not require that an applicant be competent to assist his counsel in filing an application for a writ of habeas corpus. I disagree.[1]

It is true, as the majority notes, that our code of criminal procedure "contains no mention of a defendant's incompetence to bring habeas corpus proceedings." *Ante*, at ___ (slip op. at 3). Citing to other provisions of art. 11.071 that are not directly related to

[1] The majority also finds that such competence is not constitutionally required. Because I find that it is statutorily required, I do not reach the constitutional issue.

the issue of competence,[2] the majority concludes that such competence is not statutorily required.

That, however, is not the end of our inquiry. Although art. 11.071 does not explicitly contain a provision dealing with an applicant's competence, it does, as the majority acknowledges,[3] mandate that "counsel shall investigate expeditiously. . .the factual and legal grounds for the filing of an application for a writ of habeas corpus." TEX. CODE CRIM. PROC. art. 11.071, § 3(a). While it is not necessarily so in every habeas application, the circumstances of a particular application may dictate that in order for counsel to be able to fully comply with this provision of the code, he must be able to communicate with and be assisted by the applicant. That is, an applicant's competence to assist his/her counsel may be necessary in order for counsel to comply with art. 11.071, § 3(a). In such a case, our code of criminal procedure does implicitly and necessarily require that an applicant be competent to assist his counsel in filing a writ application.

As at least two other state supreme courts have recognized, an applicant's ability to communicate with counsel may be particularly important in the development of factual grounds. *See Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997); *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727, 732 (Wis. 1994). However, not all habeas petitions will necessarily require development of grounds which require counsel

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[2] *Ante*, at ___ (slip op. at 3-5).

[3] *Ante*, at ___ (slip op. at 4).

to communicate with and be assisted by applicant. Therefore, following the rationale of the Florida Supreme Court in *Carter*, I would hold that a habeas court be required to hold a competency hearing when an applicant has shown that there are "specific factual matters at issue that require applicant to competently consult with counsel," i.e., "when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require [applicant's] input." *Carter*, 706 So. 2d at 875. Such an approach would aid in ensuring adherence to the legislative directive of art. 11.071, § 3(a).[4]

In the instant application, counsel for applicant filed a motion with the habeas court for a competency hearing. The court did not rule on the motion by the time the writ was filed with this court. Therefore, I would remand this cause to the habeas court to give applicant the opportunity to demonstrate that there are specific factual matters at issue which would require

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[4] Though based on a legislative, rather than constitutional, mandate, this approach is also generally consistent with our recent decision in *Potter v. State*, 21 S.W.3d 290, 296 (Tex. Crim. App. 2000), in which we held that within the context of extradition proceedings, "the accused must be sufficiently competent to discuss with his counsel facts relating to the limited defenses [of identity and presence] that may be raised."

that applicant be competent to consult with counsel. Because the court does not do so, I dissent.

Johnson, J.

Date Delivered: September 13, 2000

Publish

FILED: May 21, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES E. MINES, JR	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-00-CV-2044-H
	§	
JANIE COCKRELL,	§	
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONS DIVISION,	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636(b), implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge follow:

FINDINGS AND CONCLUSIONS

I. NATURE OF THE CASE

A state prison inmate has filed a petition for writ of habeas corpus pursuant to Title 28, United States Code, Section 2254.

II. PARTIES

Petitioner, Charles Mines, Jr., is an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). Respondent is the Director of TDCJ-ID.

III. PROCEDURAL HISTORY

A jury convicted Petitioner of capital murder, and his punishment was assessed at death by lethal injection. *State v. Mines*, Cause No. 16,691 (40th Judicial District Court of Ellis County, Tex. June 2, 1989). The case was appealed to the Texas Court of Criminal Appeals, and the Court of Criminal Appeals affirmed the conviction and death sentence in a published opinion. *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1993). The Supreme Court then granted Petitioner's petition for certiorari and remanded the case back to the Court of Criminal Appeals for reconsideration in light of its opinion in *Johnson v. Texas*, 509 U.S. 350 (1993). *See Mines v. Texas*, 570 U.S. 802 (1993). On remand, the Court of Criminal Appeals once again affirmed Petitioner's conviction and death sentence. *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1117 (1995). Petitioner subsequently filed a state application for writ

of habeas corpus on April 7, 1997. The Court of Criminal Appeals denied relief in a published opinion. *Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 908 (2001).

Petitioner filed his initial federal petition for writ of habeas corpus on December 21, 2000, and an amended petition on April 20, 2001. Respondent filed an answer on June 18, 2001, and furnished the state court records.

IV. RULE 5 STATEMENT

Respondent states that Petitioner has exhausted all of his state court remedies, except for his fourth ground for relief and portions of his fifth and sixth grounds for relief. Respondent asserts that Petitioner did not address these claims either on direct appeal or in his state writ of habeas corpus. Nonetheless, Respondent asserts that these claims should be denied on their merits pursuant to 28 U.S.C. § 2254(b)(2).[1]

V. ISSUES

Petitioner raises the following eleven claims for relief:

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[1] An application for a writ of habeas corpus may be denied on its merits, notwithstanding the failure of the application to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b)(2) (West 2001).

A. Petitioner is presently incompetent to be executed under the standard set forth in the Supreme Court case *Ford v. Wainwright* and subsequent Fifth Circuit case law;

B. Petitioner was convicted and sentenced to death in violation of the Fourteenth Amendment because he was incompetent to stand trial;

C. The trial court violated Petitioner's due process rights by failing to halt the trial and conduct a second competency hearing;

D. Petitioner's confession was obtained in violation of the Fifth and Fourteenth Amendments because Petitioner's assertion that he did not wish to answer any questions was not scrupulously honored by the police;

E. Petitioner was denied effective assistance of counsel at trial in violation of the Sixth Amendment;

F. Petitioner was denied effective assistance of counsel on appeal in violation of the Sixth Amendment;

G. The testimony of Dr. James Grigson at both the guilt and punishment phase of Petitioner's trial violated Petitioner's rights under the Fifth and Fourteenth Amendments.

H. Petitioner's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments

were violated because the jury was unable to give effect to Petitioner's mitigating evidence of mental illness at the sentencing phase of the trial;

I. Petitioner's constitutional right under the Sixth and Fourteenth Amendments were violated because African-Americans were underrepresented in the venire from which Petitioner's jury was selected;

J. Texas' capital sentencing scheme violates the Fifth, Eighth, and Fourteenth Amendments; and

K. The cumulative effect of the above constitutional violations has denied Petitioner his due process rights under the Fifth and Fourteenth Amendments.

Moreover, Petitioner argues that the state habeas court did not adjudicate the majority of the claims raised in the state habeas proceeding on their merits and therefore the court's findings are not entitled to deference. And, Petitioner argues that this proceeding should be stayed because he is currently incompetent to assist in his own defense.

VI. STANDARD OF REVIEW

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. § 2254, provide:

> (d) An application for a writ of habeas corpus on behalf on a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d) (2000).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 ;(5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decided a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-3 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies

that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. Under *Williams*, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Section 2254(d)(2) concerns questions of fact. *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). Under § 2254(d)(2), federal courts "give deference to the state court's findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.) (as modified on denial of rehearing), *cert. denied*, 531 U.S. 1002 (2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

This statute applies to all federal habeas corpus petitions which, as with the instant case, were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Resolution on the merits in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

VII. FACTUAL BACKGROUND

The evidence presented at trial established that during the middle of the day on May 27, 1988, Petitioner entered the home of the eighty-year-old victim, Vivian Moreno, her son Joe, and her physically disabled daughter Frances, by way of a window leading into a closet. After being confronted by Vivian and Frances upon exiting the closet into a bedroom, Petitioner attacked the women, hitting them both numerous times with a hammer that was later found in the bedroom. R. IX:58, 127). Vivian Moreno died as a result of this attack, and Frances Moreno was severely injured, remained in a coma for several weeks after the attack, and at the time of trial remained physically injured because of the attack, was unable to remember any of the events surrounding the attack, and therefore was unable to testify. R. IX:35-36, 143-45).

Petitioner was arrested three days later after being found camped out in a wooded area about seventy-five yards from the house. R. IX:46-47). At the time of his arrest, Petitioner was wearing a shirt and shoes that belonged to Joe Moreno and had Vivian Moreno's crucifix and several items of food from the house in the possession. R.IX: 46-49). Petitioner's fingerprint was found on the windowsill inside of the closet and the board that had covered the window. (R.IX:72, 75, 133-34). Petitioner gave a statement to the police in which he confessed to the crime, stating that he had initially entered the house in order to search for food, and he attacked the two women because he was confronted by them upon entering a bedroom from the closet. (R.IX:80-83).

VIII. REQUEST FOR STAY

Petitioner initially requests that this Court stay these federal habeas proceedings indefinitely. Petitioner asserts that he has been and is currently incompetent to assist his habeas counsel in the preparation of his federal habeas petition. Accordingly, Petitioner asserts that the federal habeas process should be stayed until such time that he is competent to assist counsel.

The only case law Petitioner has cited as support for his contention that this proceeding be stayed is *Calderon v. United States District Court for the Central District of California (Kelly)*, 165 F.3d 530, 541 (9th Cir. 1998). In *Kelly*, however, the Ninth Circuit ruled that the possible incompetency of a federal petitioner was a basis to equitably toll the AEDPA's one year filing deadline. That case did not hold that possible incompetency on the part of a petitioner required that the consideration of a federal petition be stayed. And, more importantly, neither the Supreme Court not the Fifth Circuit has held that a federal petitioner must be judged competent to assist in his defense before a court may consider his petition for writ of habeas corpus. While these courts have recognized that the federal constitution requires that a criminal defendant be competent to stand trial, competent to plead guilty, and competent to waive both direct and collateral appeals, neither court has recognized that the constitution requires that a federal habeas petitioner be competent during the federal habeas process. *See Drope v. Missouri*, 420 U.S. 162 (1975); *Rees v. Peyton*, 384 ;U.S. 312 (1966); *Pate v. Robinson*, 383 U.S. 375 (1966); *Mata v. Johnson*, 210 F.3d 324, 332 (5th Cir. 2000).

To the contrary, in *Mata* the Fifth Circuit, in ruling that a hearing was required to determine whether Mata was competent to waive his right to a federal petition, referred to evidence that Mata had suffered from mental health problems throughout the time that his habeas petition was adjudicated in federal court. Thus, while the Fifth Circuit has not specifically ruled on the particular issue raised by Petitioner, the Court in Mata, by referring to evidence of Mata's ongoing mental problems as possible evidence of his incompetency to waive his collateral attacks, suggested that while Mata was required to be competent to *waive* his federal collateral attack on his conviction and death sentence, he did not have to be similarly competent in order for his federal habeas petition to be considered on its merits by both the district court and the Fifth Circuit. Therefore, without any case law as support for Petitioner's request that his federal habeas proceedings be stayed due to his alleged incompetence to assist in his own defense, this request must be denied.

IX. STATE COURT'S ADJUDICATION

Petitioner further asserts that the state habeas courts recommendation that relief be denied, and the Court of Criminal Appeals' subsequent denial of relief, should not be given deference because, except for one ground, none of the remaining grounds raised by Petitioner during the state habeas process were decided on their merits. As support for this contention, Petitioner points to the Court of Criminal Appeals' published opinion *Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000). In that opinion, the Court of Criminal Appeals only addressed the merits of one of Petitioner's claims and did not mention the substance of the other

claims. Thus, Petitioner argues, none of the remaining claims were addressed on their merits.

Contrary to this argument, however, at the beginning of the opinion, the court noted that Petitioner had filed a state application for writ of habeas corpus containing sixty-eight allegations, that the trial court recommended that relief be denied, and that the Court of Criminal Appeals ordered the case filed and set for consideration on Petitioner's allegation that he was incompetent to assist on his state writ of habeas corpus. *Mines,* 26 S.W.3d at 911. Then, at the end of the opinion the court, after deciding against Petitioner with regards to the submitted issue, specifically stated that: "[t]he relief requested is denied." *Id.* at 916. A subsequent mandate issued by the Court of Criminal Appeals on October 9, 2000, stated that "habeas corpus relief is denied." The Fifth Circuit has stated that a denial of relief by the Court of Criminal Appeals is a denial on the merits. *Dowhitt v. Johnson*, 230 F.3d 733, 755 (5th Cir. 2000). Accordingly, Petitioner's argument is without merit, and it is appropriate that all of Petitioner's claims that were also raised by Petitioner in his state writ should be addressed through the deferential framework of § 2254(d).

But, although Petitioner's state habeas court claims were adjudicated on the merits and subsequently denied, the state habeas court did not issue any findings of fact or mixed findings of fact and conclusions of law. Instead, that court issued an order on June 12, 1997, denying an evidentiary hearing and stating that all relief was denied. (State Habeas Transcript at 118). Neither party had submitted proposed findings, and the state habeas court did not issue any. In its order, the trial court

states that the State's recitation of the facts is supported by the record. However, during the state habeas process, the State submitted a response that only generally denied each ground for relief. No facts were recounted in this response. (SHTr.:110-17). Accordingly, no findings of fact were either made or adopted by the state habeas court at the state habeas level. Without any findings of fact, there can be no presumption of correctness afforded to findings of fact under 28 U.S.C. § 2254(e)(1). *See Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994). This court will not, therefore, accorded any presumption of correctness to any facts developed at the state habeas level.

The absence of findings of fact at the state habeas level, however, does not necessarily necessitate a hearing at this level. *See Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) (noting that a district court does not abuse its discretion in refusing to grant an evidentiary hearing, even where there are no factual findings made by a state court). In the case at hand, this Court has determined that there was adequate factual development of the claims raised either at the state trial level or during the state habeas process. Moreover, there are factual findings that were made at the trial level that must be afforded deference. Accordingly, because no further factual development is necessary at this level, an evidentiary hearing is unnecessary. *See Murphy v. Johnson*, 205 F.3d at 815; *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998) (noting that a habeas petitioner must show either a factual dispute which, if resolved in his favor, would entitle him to relief *or* a factual dispute that would require development in order to assess the claim in order to be entitled to an evidentiary hearing in federal court).

X. EXAMINATION OF THE GROUNDS FOR RELIEF

A. Competency to be Executed

In his first ground for relief, Petitioner asserts that he is currently incompetent to be executed under the standard set forth in *Ford v. Wainwright*, 477 U.S. 399 (1986), and he is therefore entitled to habeas relief. Petitioner states further that he believes that this claim is not yet ripe for review as he does not have a pending execution date, but that he raises this claim now pursuant to *Stewart v. Martinez-Villareal*, 523 U.S. 537 (1998). Respondent in turn agrees that this claim is not ripe for review and further asserts that Petitioner should first exhaust his state court remedies with respect to this issue before seeking federal habeas relief.

In *Ford v. Wainwright*, a plurality of the Supreme Court held both that the Eighth Amendment prohibits the execution of the insane that the procedure used by the state of Florida to determine Ford's competence to be executed was constitutionally inadequate. *Id.* at 409-10, 416. But, Justice Marshall, who wrote the plurality opinior, did not dictate a particular standard for determining whether a person is competent to be executed. In a concurring opinion joined by Justice White, however, Justice Powell stated that the standard he would adopt is one which would require that a criminal defendant who is executed know the fact of his impending execution and the reason for it. *Id.* at 422. Since *Ford* was handed down by the Supreme Court, the Fifth Circuit has stated that the plurality opinion in *Ford* was made a majority by Justice Powell's concurring opinion and has therefore specifically adopted Powell's

standard for determining competency to be executed. *Barnard v. Collins*, 13 F.3d 871, 876 n.2 (5th Cir. 1994), *citing Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988).

In his plurality opinion in *Ford*, Justice Marshall found that Florida's procedure for determining competency to be executed was constitutionally inadequate for several reasons. These reasons were: 1) the procedure did not allow material to be submitted on the prisoner's behalf; 2) there was no opportunity for counsel for the condemned to challenge or impeach the state-appointed psychiatrists' opinions; 3) the psychiatric examinations lasted no more than thirty minutes; and 4) most importantly, the final decision regarding competency to be executed was placed wholly within the executive branch because the decision was made by the governor of Florida. 477 U.S. at 413-6. In the concurring opinion, Justice Powell, joined by Justice White, also suggested that constitutionally acceptable procedure would be one where an impartial officer or board can receive argument and materials from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. *Id.* at 427.

The Texas Legislature has enacted Article 46.05 of the Texas Code of Criminal Procedure, which is a statute outlining a specific procedure to be followed when a prisoner makes a claim that he is incompetent to be executed. *See* TEX. CODE CRIM. PROC. ANN. art. 46.05 (Vernon 2001) (formerly art. 46.04). This statute was enacted in 1999, and Petitioner has not as of yet availed himself of this procedure. Under this state statute, upon a motion filed with supporting documentation, if a

substantial doubt is raised as to a defendant's competency to be executed, the trial court is required to order at least two mental health experts to examine the defendant to determine his competency to be executed. Incompetency to be executed must be shown by a preponderance of the evidence, and after a finding of incompetency is made by the trial court, the Court of Criminal Appeals makes the final determination regarding whether a stay of execution should be issued. This procedure has recently been held to be constitutionally valid by the Fifth Circuit. *Caldwell v. Johnson*, 226 F.3d 367, 373 (5th Cir.), *cert. denied*, 530 U.S. 1298 (2000).

The Fifth Circuit has previously held that the AEDPA bars an inmate from raising a claim that he is incompetent to be executed for the first time in a successive habeas petition where the factual basis for this claim was available when the first federal petition was filed. *Richardson v. Johnson*, 256 F.3d 257, 258-59 (5th Cir. 2001), *cert. denied*, 533 U.S. 942 (2001); *In re Davis*, 121 F.3d 952 (5th Cir. 1997). In the case at hand, the factual basis for this claim is available at this time. Thus, it was necessary for Petitioner to raise this claim in this petition as it would have been barred if raised for the first time after he had exhausted his state court remedies under Article 46.05. However, the state of Texas has not yet had the opportunity to rule on this issue, and there is now a specific procedure to do so. In *Caldwell v. Johnson*, a case in which a federal habeas petition filed a second federal habeas petition raising a *Ford* claim, a Fifth Circuit panel referenced the fact that, when it had previously ruled on Caldwell's first federal petition, the Court had determined that Caldwell's *Ford* claim was premature because he had not yet availed

himself of the procedure outlined in Article 46.05.226 F.3d at 369-70. Moreover, in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998), the Supreme Court held that a federal petitioner's *Ford* claim, raised for the second time after his first claim was dismissed by the district court, was not a successive application under the AEDPA and therefore could be considered on its merits by the district court without receiving prior permission from the circuit court. Therefore, looking at these two cases, it appears that the appropriate action to be taken is that this claim be dismissed in order for Petitioner to exhaust his state court remedies under Article 46.05. It is therefore recommended that this claim be dismissed without prejudice.

B. Competency to Stand Trial

In his second ground for relief, Petitioner asserts that he was convicted and sentenced to death in violation of the Fourteenth Amendment because he was incompetent to stand trial at the time that he was tried for capital murder. Specifically, Petitioner argues that, even though the trial court held a hearing regarding Petitioner's competency prior to his trial and a jury determined that he was competent to be tried for capital murder, the evidence presented at the time of trial, we well as evidence presented during the state habeas process, establishes that he did not have the ability to consult with his attorney or assist his attorney in preparing and presenting a defense at trial.

Applicable Law

The Supreme Court has held that due process requires that a criminal defendant be competent to stand

trial before he is prosecuted. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Specifically, the Supreme Court has stated that the appropriate test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). The Fifth Circuit has stated that a state court's determination of competency is a finding of fact entitled to a presumption of correctness. *Miller-El v. Johnson*, 261 F.3d 445, 454 (5th Cir. 2001), *reversed on other grounds*, ___U.S.___, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, before a federal habeas court has any duty to investigate a claim of incompetency, a petitioner must present sufficient facts that positively establish a legitimate doubt regarding the petitioner's ability to meaningfully participate and cooperate with counsel during trial. *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996). And, under § 2254(e)(1), a habeas petitioner is entitled to a *nunc pro tunc* hearing regarding his competence to stand trial only when he has made a showing by clear and convincing evidence that raises a threshold doubt about his competency. *Miller-El*, 261 F.3d at 454, *citing Lokosv. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980).

Applicable Facts

On March 13, 1989, prior to Petitioner's capital murder trial, the trial court held a competency hearing pursuant to a motion filed by defense counsel. In this motion, defense counsel stated that he believed that competency was an issue at trial because Petitioner had previously been examined by a psychiatrist who judged him to be incompetent to stand trial in a previous case.

(Transcript at 7-8). At this hearing, the defense presented testimony from psychiatrist Dr. Ricardo Schack, and the State presented testimony from the Ellis County jail administrator, a jailer, psychiatrist Dr. James Grigson, and psychiatrist Dr. Quynn Nguyen.

Dr. Schack testified that he had seen Petitioner three time in November of 1988, after he was incarcerated on capital murder charges, and had also examined Petitioner in April of 1988. ®. II:12). Schack testified that in his opinion Petitioner suffers from bipolar disorder. Because he has this disorder, Petitioner has an inflated sense of self-worth and exercises poor judgment, such as declining the services of his attorney, declining to cooperate with the psychiatric examinations, and stating that he did not need to have anything to do with the courts and judges. ®. II:26-27, 31-32, 37-8). Schack further testified that Petitioner was "hyperalert" whenever he saw him and that speaking to him was like being a constant argument, with Petitioner constantly suspicious. ®. II:18-19). Schack also testified that Petitioner was delusional, telling him that he was a gambler with lots of money. (R.II:34). Because of the bipolar diagnosis, Schack testified that Petitioner was unable to make rational and informed decisions regarding his situation and did not have a rational as well as factual understanding of the proceedings against him. (R.II:21). Schack acknowledged that Petitioner knew he had a lawyer who represented him, would communicate to Schack to a limited degree, and was oriented to the date and to the fact that he was in jail. (R.II:24-26). Schack also acknowledged that Petitioner's behavior during the competency hearing was more muted than it had been during the examinations, indicating that he is

capable of controlling his behavior to a certain degree. (R.II:36-37, 40).

Dr. Grigson testified that he attempted to examine Petitioner after being appointed by the trial court, but Petitioner declined to speak to him. Nevertheless, Grigson opined that, based on Petitioner's behavior at their initial meeting and during the competency hearing, as well as Petitioner's records from Terrell State Hospital, Petitioner was competent to stand trial. Specifically, Grigson noted that, while Petitioner had made verbal outbursts throughout the competency hearing, these outbursts were deliberate and intentional and were appropriate responses to questions asked. (R.II:68).

Dr. Nguyen testified that he works at Terrell State Hospital as a psychiatrist. He further testified that Petitioner was sent to the hospital on May 19, 1988, under protective custody in order to be observed and was at the hospital for five days. ®. II:78-81).[2] Nguyen further testified that he conducted a full mental status examination and a physical examination on Petitioner and determined that he was neither physically nor mentally ill. (R.II:81-84). Nguyen also testified that

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[2] Petitioner had previously been arrested for robbery in Ellis County and spent several months in the county jail. In April of 1988, Dr. Schack examined him and decided that he was not competent to stand trial on the robbery charge. Subsequent to this determination, the prosecutor dismissed the robbery charge and Petitioner was civilly committed at Terrell. After five days of observation there, Dr. Nguyen determined that Petitioner was not suffering from any mental disease or defect and released him. Petitioner then made his wayback to Waxahachie, where the murder was committed. (R.II:94-96; IX:80-83).

Petitioner was unwilling to provide any personal information and would not cooperate with any psychological exam. (R.II:82, 88-89). Nevertheless, Nguyen testified that Petitioner was willing to cooperate with him personally and did not exhibit any aggressive behavior, delusions, or hallucinations while at the hospital. He determined that Petitioner was oriented to time and place, recognized that there was a legal process, and understood why he had been in jail and why he was at the hospital. (R.II:82-83, 96). Finally, Nguyen diagnosed Petitioner as having a mixed personality disorder, with anti-social, paranoia, and passive aggressive features, but testified that as of May 24, 1988, Petitioner was competent to stand trial. (R.II:91-93).

The jail administrator, Jim Underwood, testified that Petitioner was placed in a single cell after a fight with another inmate. He further testified that Petitioner knew he was in jail, recognized that Underwood was a jailer, and told Underwood that he did not want to speak to him unless it was regarding a legal matter. Underwood was not aware of any problems Petitioner caused in jail. ®. II:41-45). Jailer Kelvin Branch testified that he had spoken to Petitioner several times on subjects such as jail administration, sports, and revolutionary China. He further testified that Petitioner knew what materials he was entitled to while in the jail, requested materials such as reading and writing materials, spoke to his attorney when he was there, and dressed, ate, and acted appropriately. Branch did acknowledge that other inmates referred to Petitioner as "crazy man" and that Petitioner had had problems with other inmates before he was placed in a single cell. ®. II:47-61).

During the competency hearing itself, the record reflects that Petitioner made several comments. These comments were made in response to testimony given by various witnesses. The majority of his comments were made when Dr. Schack was testifying and were comments made in answer to questions posed by the attorneys or in order to "correct" the testimony given. For instance, when defense counsel asked Dr. Schack what dates he had met with Petitioner since May of 1988, Petitioner answered with the three dates he saw Dr. Schack in November of 1988. (R.II:12). Later, when Dr. Schack testified that Petitioner was lying down in his cell on the first day, Petitioner corrected him by stating "I never did lay down." (R.II:16). Later, Petitioner corrected the jailer, who referred to him as a black man, by stating that he was "colored," the term he evidently preferred. (R.II:58-59).

During the state habeas process, as well as at this level, Petitioner has submitted further evidence to support his claim that he was incompetent to stand trial. Specifically, two psychiatrists, Dr. J. Douglas Crowder and Dr. Dr. Dhiren Patel, submitted letters to Petitioner's state habeas counsel after examining Petitioner on death row on March 13, 1997. Both diagnosed Petitioner as having bipolar disorder with psychotic features. In his letter, Dr. Crowder went on to discuss the mitigating factors of this diagnosis, but did not give an opinion regarding Petitioner' s competence to stand trial. In his letter, Dr. Patel outlined the various symptoms of bipolar disorder and stated his belief that both Dr. Grigson and Dr. Nguyen missed this diagnosis. Dr. Patel also gave no opinion about Petitioner's competency to stand trial. (Petition, exhibits S & T).

Petitioner has also submitted numerous documents from TDCJ documenting his mental health while on death row. Documents reflect that in March of 2001, he was sent to the crisis management unit for being delusional, particularly regarding his beliefs that other inmates were conspiring against him. There he was documented as having grandiose thoughts, but also as being coherent and well-oriented. He was diagnosed by the psychiatrist at that time as having a severe personality disorder, rather than bipolar disorder, and was discharged back to his unit. (Petition, ex. #2). The documents also reflect a long history of refusing any medical treatment, including any medication for mental disorders. (Petition, ex. #3). Furthermore, the documents reflect that Petitioner had previously been diagnosed as having bipolar disorder, with a sub-diagnosis of anti-personality disorder, in the late 1980's and early 1990's, and that, similar to Dr. Schack's testimony at his competency hearing, Petitioner had exhibited poor judgment and hostile speech throughout his tie on death row. (Petition, ex. #3).

Analysis

The state habeas court denied this claim. This decision is not contrary to federal law. With regard to the evidence presented at the competency hearing, Petitioner in essence reiterates his position that Dr. Schack was correct in his diagnosis and that Drs. Grigson and Nguyen were not. Petitioner also calls into question their diagnoses by pointing to Grigson's history of testifying for the State in capital murder trials and the case load that Nguyen had when he examined Petitioner. All of these points, however, were made at the competency hearing by defense counsel, both during

cross-examination and closing argument. Thus, Petitioner in essence disagrees with the jury's decision. There was evidence presented, however, that supported this decision, including testimony from Dr. Grigson and Dr. Nguyen, as well as from the jailers.

With regard to the additional evidence presented by Petitioner, while this evidence further supports a diagnosis of bipolar disorder, none of this evidence addresses the issue of Petitioner's competency to stand trial and all of it is concerned with Petitioner's condition subsequent to his trial. In the instant case, Petitioner asserts that he was incompetent to stand trial, notwithstanding that the evidence he cites to support his claim was presented to a jury and was unanimously rejected. Moreover, as noted by Respondent, the cases Petitioner cites as support for this claim are cases in which no competency hearing was held at the trial level and a federal habeas petitioner contends that one should have been held. Had Petitioner never been granted a competency hearing, his claim might every well have merit, as the record does contain evidence that calls into question Petitioner's ability to consult with his attorney, as well as his rational understanding of the proceedings against him. But, in the case at hand a full evidentiary hearing has been conducted on this issue, where this evidence was presented to a jury. At this hearing, the jury was instructed that, in order to be considered competent, a defendant must have "sufficient present ability to consult with his attorney with his attorney with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceeding against him." (TR.:58). This was the correct legal test. And, the jury unanimously ruled that Petitioner was competent to stand trial, a factual finding

which is entitled to a presumption of correctness in this Court. (Tr.:60). Given this factual finding, along with the fact that Petitioner has pointed to no new evidence, as opposed to cumulative evidence, to contradict the verdict from that hearing, it cannot be said that Petitioner has raised a legitimate doubt regarding his ability to meaningfully participate and cooperate with counsel during trial. It is therefore recommended that Petitioner's second ground for relief be denied.

C. Failure to hold Competency Hearing

In his third ground for relief, Petitioner contends that the trial court violated his constitutional rights by failing to halt his capital murder trial and hold a second competency hearing. Specifically, Petitioner contends that, although he had previously been found to be competent in a competency hearing conducted on March 13, 1989, his behavior during the subsequent voir dire process and trial was sufficient evidence that required the trial court to halt the trial and conduct a second competency hearing. Accordingly, Petitioner asserts that he is entitled to retrospective competency exam.

In order to protect a criminal defendant's right to a fair trial a trial judge is required to conduct further inquiry into the defendant's mental capacity if he receives information that creates a "bona fide" doubt as to the defendant's competency. *Drope v. Missouri,* 420 U.S. 162, 180-82 (1975); *Pate v. Robinson,* 383 U.S. 375, 385 (1966); *Johnson v. Estelle,* 704 F.2d 232, 238 (5th Cir. 1983). The Fifth Circuit has further explained that a trial court must conduct further inquiry into a defendant's mental competency if he received information which, "objectively considered, should reasonably have raised a doubt about the defendant's

competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence is relevant in order to determine whether further inquiry is required, but the presence of only one of these factors may, in some circumstances, be sufficient to require further inquiry. *Drope*, 420 U.S. at 180. Moreover, even when a defendant is competent at the beginning of his trial, the trial court must be alert to circumstances suggesting a change in his mental capacity. *Id.* At 181.

Petitioner contends that the following was evidence known to the trial judge that should have created a doubt as to his competency to stand trial and thus a second competency hearing was constitutionally required:

1) Petitioner insisted on being tried in jail clothing over his counsel's advice, stating that this was "due to the malfunction of the Ellis County Jail," even thought the trial judge was willing to make civilian clothes available to Petitioner. (R. IV:2).

2) Petitioner, similar to his conduct during the competency hearing, made various statements during the voir dire process, including informing a panel member that he was "colored," not black; telling this same veniremember that she should read the book of Leviticus and its statements regarding homosexuality after she mentioned the Old Testament in response to a question; telling his attorney that "[y]ou don't need to

interrupt" after his attorney stated that he needed to interrupt in order to make a challenge for cause; and informing a potential juror that he did not know what Petitioner did. (R. V:13, 36, 42-43, 52; R. VI:3).

3) At a hearing held during the state habeas process, in responding to a request from Petitioner's attorney that Petitioner be bench warranted back to Ellis County, the trial judge commented that he remembered that he previously had to instruct Petition to bathe himself because he would not do so at the request of jail personnel, that Petitioner could be rambunctious and cantankerous, and that Petitioner would exhibit erratic behavior to his trial defense counsel by sometimes cooperating with him and sometimes not cooperating. (Petition, Exhibit M).

Prior to the imposition of sentence in the instant case, trial counsel filed a motion with the court in which he asserted that the evidence established that Petitioner was incompetent to stand trial and that therefore a competency hearing should be held in lieu of the imposition of sentence. This motion was denied by the trial court. (Tr.:120-121). On direct appeal, the Court of Criminal Appeals ruled that the trial court did not err in denying this motion in light of the recent adjudication of Petitioner's competency at the pre-trial competency hearing. *Mines*, 852 S.W.2d at 948). This same ground was denied on constitutional grounds at the state habeas level.

These decisions are not contrary to federal law. While the evidence that Petitioner points to may have been sufficient to require further inquiry by the trial court had further inquiry not already been conducted, in

the instant case the trial court had held a full competency hearing in which both parties called witnesses and argued their positions to a jury that then unanimously found Petitioner competent to stand trial. Thus, the trial court had already acted to protect Petitioner's due process rights. And, although the Supreme Court has noted that changes in a defendant's circumstances may be sufficient cause for further inquiry into his competence, Petitioner has not shown any change in his behavior or circumstances. While Petitioner was prone to verbal outbursts during voir dire, he made similar verbal outbursts during the competency hearing within the hearing of the jury. (R. II:16), 25, 27, 29, 31, 32, 34, 58). Indeed, two of the three psychiatrists who testified at the hearing commented on these outbursts. (R. II:35, 68-69). Furthermore, Dr. Ricardo Schack also testified at the competency hearing about Petitioner's cantankerous and argumentative personality and his tendency to refuse to cooperate with people, using these observations as further support for his diagnosis of bipolar disorder. (R. II: 18-20, 37). Therefore, Petitioner's tendency towards outbursts and his unwillingness to cooperate with others was not only known by the trial judge prior to Petitioner's trial, but evidence of this behavior was before the jury at the pre-trial competency hearing. Because this competency hearing had been held in close proximity to the trial and because Petitioner has pointed to no great change in circumstances that would create a constitutional requirement for a second competency hearing, this ground is without merit and should be denied.

D. Confession

In his fourth ground for relief, Petition claims that his Fifth and Fourteenth Amendment rights were violated because his *Miranda* rights were violated when the police did not scrupulously honor his desire to remain silent when he was questioned by the police after he was arrested. Petitioner therefore asserts that he is entitled to a reversal of both is conviction and his death sentence. In response, Respondent asserts that this ground is procedurally barred because Petitioner failed to exhaust his state court remedies.

Petitioner did not raise this claim either on direct appeal or during the state habeas process. Procedural default occurs when a petitioner fails to exhaust all available state remedies *and* the state court to which he would be required to petition would now find that the claim is procedurally defaulted. *Beldsoe v. Johnson,* 188 F.3d 250, 254 (5th Cir. 1999). And indeed, were this unexhausted claim now brought in a subsequent state writ of habeas corpus, the Court of Criminal Appeals would consider this claim to be procedurally defaulted under Article 11.071 § 5 of the Texas Code of Criminal Procedure, which prohibits a claim from being raised in a subsequent habeas application unless: 1) it could not have been raised in the previous application because the federal or legal basis was unavailable at the time; or 2) the claim contains sufficient facts establishing that, but for a violation of the United States Constitution, no rational juror would have found petitioner guilty or would have answered the punishment issues in the State's favor. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.071 § 5(a) (Vernon Supp. 1999). Clearly, the legal claim presented in t his ground for relief was available to

him at the time he filed his state habeas application. Moreover, Petitioner has not proven that this unexhausted claim contains sufficient facts establishing that, but for a federal constitutional violation, *no* rational juror would have found him guilty or sentenced him to death.[3] Accordingly, Petitioner is procedurally barred from raising this ground for relief in a federal petition for writ of habeas corpus unless he can establish either cause and prejudice for the failure to raise this unexhausted claim at the state level or that the failure to consider the claim on its merits would result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.), *cert. denied*, 120 S.Ct. 444 (1999). This he has not attempted to do. Accordingly, this ground is procedurally barred, and it is recommended that it be

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[3] In that regard, while Petitioner does contend that the alleged error is not harmless error, any harmless error analysis conducted by a federal habeas court would be under the standard outlined in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), under which trial error is considered harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict. Under 11.071 § 5 of the Texas Code of Criminal Procedure, however, in order to be able to raise a claim in a subsequent state habeas petition where the underlying facts were known at the time of the first petition, one must meet the more rigorous legal sufficiency standard. While it is questionable whether Petitioner could meet even the habeas harmless error standard, he has certainly not shown that he can meet the second, given that, even without considering his confession to the crime, he was found camped out very near the house where the women were attacked, he was wearing clothes from the house when he was arrested and was in possession of other items from the house, and his fingerprints were found on the window into the closet that was shown to be the point of entry for the attacker.

denied.[4]

E. Ineffective Assistance of Counsel at Trial

In his fifth ground for relief, Petitioner asserts that his trial counsel were ineffective in several ways. Specifically, Petitioner contends that his trial counsel were ineffective for: 1) failing to object to the instructions

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[4] Respondent also asserts that this ground is also without merit. Thee has been, however inadequate factual development of this claim to make a determination on the merits. Namely, the state court records do not contain the record of the pre-trial hearing regarding the voluntariness of petitioner's written statement. This record was apparently never requested by either appellate or state habeas counsel, perhaps because no claim was ever raised at the state level that was based on the evidence gathered at this hearing. Therefore, Petitioner bases his claim here on one statement made at the trial by the police officer who took the statement that Petitioner was asked if he wanted to talk about the offense and he said "no." However, even though this statement was made during cross-examination, no context was given for this statement and defense trial counsel never questioned th is police officer any further about any possible indication from Petitioner that he did not want to speak to the officer. (R. IX:84-99) Indeed, trial counsel only objected to the admission of the statement at trial on the basis that Petitioner was insane at the time he gave the statement and therefore was not capable of giving a voluntary statement, the same objection made at the pre-trial hearing and in a pre-trial suppression motion. (R. IX: 79-80; TR.:47). The record does reflect, however, that the trial judge issued findings after the suppression hearing in which he stated that he had listened to testimony from both lay and expert witnesses at the hearing and had determined that the statement was freely and voluntarily made without coercion, mistreatment, promises, or threats. (Tr.: 96-97). Thus, other than the one statement that Petitioner points to, there is no further evidence that the State did not honor a request from Petitioner to remain silent. But, in any regard, without the record from this hearing or any further factual development of this claim this Court declines to review it on its merits.

given to the jury at the competency hearing; 2) failing to conduct an adequate investigation into potentially mitigating evidence; 3) failing to present additional expert 5testimony regarding Petitioner's mental illness; and 4) failing to object to Dr. James Grigson's testimony regarding Petitioner's future dangerousness.

Standard of Review

Whether counsel has been ineffective is determined by using the standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, in order to prove that his counsel was ineffective, a defendant must prove by a preponderance of the evidence both that counsel's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. Courts, however, should "indulge a strong presumption: that counsel's conduct falls within the range of reasonable assistance, and a defendant must overcome the presumption that an action is sound trial strategy. *Id.* At 689.

Analysis

1. Jury Charge

Petitioner first asserts that his trial counsel was ineffective for failing to object to the jury charge at the competency hearing because it stated that Petitioner was presumed competent and placed the burden on Petitioner to prove that he was incompetent by a preponderance of the evidence. Citing *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987), Petitioner contends that under Texas law the State should have had the burden of proving beyond a reasonable doubt that Petitioner was

competent to stand trial because there had been a prior finding of competency. Accordingly, Petitioner argues that his trial counsel was ineffective in allowing the burden to remain on the Petitioner.

In *Manning*, the Court of Criminal Appeals recited the relevant law regarding the burden of proof of competency hearings. Namely, a criminal defendant has the burden of proving by preponderance of the evidence his incompetency to stand trial, except that this burden shifts to the State if there has been a prior, unvacated adjudication of incompetency. *Id.* At 748. Petitioner points to the fact that Dr. Schack had previously given his expert opinion that Petitioner was incompetent to stand trial for earlier robbery charges, after which the charges were dismissed and Petitioner was civilly committed to Terrell State Hospital, where he remained for five days. (Tr.:17-19; R.IX:155-56, 197-200). Petitioner then contends that this was a prior adjudication of incompetency. Petitioner's argument, however, ignores state law. Specifically, under Texas state law the fact that a person has been ordered by a court to submit to mental health services is not an adjudication of mental incompetency. Rather, a judicial finding of incompetence is required to rebut the initial presumption that a person is mentally competent. TEX. HEALTH & SAFETY CODE ANN. § 576.002 (Vernon 1991). Accordingly, trial counsel was not ineffective for failing to object to the jury charge at the competency hearing because the jury charge correctly placed the burden of proving incompetence on Petitioner. The state habeas court denied this claim, and that decision is not contrary to federal law.

2. Mitigating Evidence

Petitioner next contends that his trial attorney was ineffective for failing to investigate and present sufficient mitigating evidence at the punishment phase of the trial. Specifically, Petitioner asserts that he has two sisters who were available to testify regarding child abuse and poverty. Respondent asserts in reply that this claim is unexhausted and procedurally barred.

This claim was not raised at the state level, either on direct or collateral appeal. Indeed, no information about Petitioner's childhood was presented to the state courts. This claim is therefore unexhausted. Petitioner has not alleged, much less proven, that the factual or legal basis for this claim was not available when the state habeas application was filed or that, but for this alleged ineffectiveness no rational juror would have answered the punishment issues in the State's favor. *See* TEX. CODE CRIM. PROC. ANN. 11.071 § 5(a) (Vernon Supp. 1999). Nor has he alleged or proven cause and prejudice for not presenting this claim at the state level or that a fundamental miscarriage of justice would occur if this claim was not considered by this Court. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This claim, therefore, is procedurally barred.

Furthermore, even if it were considered on its merits, it would fail. While Petitioner has stated in his petition that Petitioner has two sisters who were willing and available to testify, and states withing the petition what information these women would have been willing to testify to, no sworn affidavits from these women have been presented to either this Court or the state courts.

And, other than stating that they were available to testify, Petitioner has not shown that his trial counsel either knew or should have known about these women. In that regard, the record from the trial indicates that Petitioner never provided any biographical information to anyone. Indeed, when he was arrested he refused to give his name to the police and the police had to identify him by his fingerprints. (R.IX:74-75).[5] Dr. Schack testified that Petitioner was extremely uncooperative with him and gave him only minimal information about himself, and Dr. Nguyen testified that Petitioner would not discuss his personal life with him. (R.II:18-19, 82; R. IX:167). Only the jailer who testified at the competency hearing testified regarding any of Petitioner's personal history, and he testified only that Petitioner told him he was from Detroit, but otherwise did not speak of his past. (R. II:49). While Petitioner states generally that his sisters were "willing and available to testify," he does not elaborate what "available to testify" means. Without any evidence that trial counsel knew about these witnesses or would have been able to located these witnesses, considering the fact that he had an extremely uncooperative client, counsel cannot be considered ineffective for failing to present this evidence. *Wiley v. Puckett*, 969 F.2d 86, 99 (5th Cir. 1992) (recognizing that an attorney's investigation into mitigating evidence may reasonably me limited where a defendant fails to call witnesses to his attention); *Johnson v. Collins*, 964 F.2d 1527, 1533 (5th Cir. 1992) (holding that counsel was not constitutionally ineffective where he made a good faith effort to locate mitigation witness especially because his investigation was frustrated by an uncooperative client).

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[5] Petitioner had prior convictions in Virginia and North Carolina back in the 1960's and 1970's. (State's ex. #38,39).

Petitioner has therefore failed to present sufficient evidence to support this claim of ineffectiveness.

3. Mental Health evidence

Petitioner also asserts that his trial counsel was ineffective for not presenting additional evidence of his bipolar disorder as further mitigating evidence at punishment. Petitioner argues that trial counsel provided constitutionally deficient representation by only calling Dr. Schack to testify about Petitioner's bipolar disorder and not calling additional expert witnesses as further support for this diagnosis.

Petitioner contends that, because Dr. Schack had previously testified at the guilt phase and had given his opinion that Petitioner was insane at the time of the murder, something that was rejected by the jury, the jury would have been prejudiced against Schack's testimony at the punishment phase of the trial. Petitioner further argues that Petitioner did not present *enough* evidence about his mental illness so that the jury did not have a complete and accurate picture of Petitioner's illness. For instance, Petitioner has submitted as evidence two letters from psychiatrists Dr. Crowder and Dr. Patel. In his letter, Dr. Crowder, while supporting Dr. Schack's diagnosis opines that Dr. Schack did not sufficiently emphasize in his testimony the point that people with the bipolar disorder have a significant tendency to commit criminal acts as a result of their impulsivity and poor judgment. (Petition, ex. S). In his letter, Dr. Patel also states his support for the bipolar diagnosis and further states that people with this disorder who remain untreated have a high degree of violence. (Petition, ex. T).

The Fifth Circuit has states that a failure to present mitigating evidence at the punishment phase of a trial is not ineffective assistance *per se*. *Smith v. Cockrell*, 311 F.3d 661, 669 (5th Cir. 2002). Instead, each case must be determined on its facts, and a reviewing court should be wary of an argument that an attorney did not investigate enough or failed to present enough evidence. *Id., citing Dowthitt v. Johnson*,230 F.3d 733, 743 (5th Cir. 2000).

At the guilt phase of the trial, Dr. Schack testified that Petitioner has bipolar disorder, a disorder characterized by irrational thoughts and impulsive behavior. Schack further testified that someone with bipolar disorder can become violent and dangerous. (R.IX:161). In specific, Schack testified that Petitioner show symptoms such as argumentativeness, irritability and impaired judgment. Schack also testified that Petitioner had delusions of grandeur and paranoid delusions and that his condition rendered him unable to understand that his contact on the day of the murder was wrong. (R.IX:166, 188, 192). At the punishment phase of the trial, Schack testified that treatment through the use of medication would reduce the odds of future acts of violence. (R.IX:286-87). Thus, Schack did testify about Petitioner's poor impulse control and poor judgment, the tendency towards violence, and the availability of treatment. Therefore, Petitioner's argument is not that trial counsel did not present this type of evidence, but rather that trial counsel did not present enough evidence about his mental health. Trial counsel, however, presented the testimony of a psychiatrist who had examined Petitioner both before and after the murder, had diagnosed him as having bipolar disorder before he committed capital murder, and whose professional opinion had remained constant

throughout the months that Petitioner was incarcerated. With the exception of Dr. Nguyen, who testified for the State at the guilt phase of the trial, no other mental health expert had examined Petitioner in such close proximity to the murder. And, Dr. Schack had also been appointed by the trial counsel to examine Petitioner after the murder. Thus, he had had the most contact with Petitioner over the longest period of time. While undoubtably trial counsel *could* have attempted to have Petitioner examined by a second expert, it was not deficient performance not to do so.

Moreover, given that all of the evidence about bipolar disorder that Drs. Crowder and Patel mention in their letters was testified to by Dr. Schack, Petitioner has not shown a reasonable probability that he would not have received a death sentence had another witness testified.[6] This ground was denied at the state habeas level, and this decision is not contrary to federal law.

4. Dr. Grigson's testimony

Finally, Petitioner asserts that his trial counsel was ineffective for failing to object to Grigson's testimony at

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[6] While Petitioner argues, without supporting evidence, that the jury was prejudiced against Schack because it had not found that Petitioner was insane at the time of the murder, it should be noted that the burden of proof was on the defense to prove insanity at the guilt phase. (Tr.:110). Given that Petitioner gave a written statement shortly after the murder stating in extreme detail all of the circumstances surrounding the murder, and that the officer who took this statement testified at trial that Petitioner told him that he knew what he did was wrong and he regretted it, but that there was nothing else he could have done, that burden was a difficult one to meet. (R.IX:80-83, 99-100). The defense did not have such a burden of proof at the punishment phase of the trial, however.

the punishment phase of the trial. Petitioner contends that defense counsel should have objected to Grigson's testimony because Grigson has a "notorious" reputation and because the American Psychiatric Association had condemned the practice of psychiatrists predicting future dangerousness.

As noted by Respondent, Petitioner's argument is flawed because the Texas Court of Criminal Appeals, the Fifth Circuit, and the Supreme Court have all held that the federal constitution does not prohibit a psychiatrist, by way of answering a hypothetical question, giving an opinion on the future dangerousness of a hypothetical defendant. *Barefoot v. Estelle*, 463 U.S. 880, 898-899 (1983); *Little v. Johnson*, 162 F.3d 855, 862-63 (5th Cir. 1998); *Matson v. State*, 819 S.W.2d 839, 852 (Tex. Crim. App. 1991). This is precisely what occurred in the case at hand. (R.IX:280-82). Furthermore, on cross-examination trial counsel was successful in getting Grigson to concede that if a criminal defendant had bipolar disorder, treatment with medication would affect his opinion that that person would be a future danger to society. (R.IX:283-84). Therefore, not only was Grigson's testimony not objectionable, and trial counsel not ineffective for failing to make a futile objection, but trial counsel appropriately addressed Grigson's testimony through cross-examination. This ground was denied by the state habeas court, and that decision is not contrary to federal law. It is recommended that Petitioner's fifth ground for relief be denied.

F. Ineffective Assistance of Counsel on Appeal

In his sixth ground for relief, Petitioner contends that he received ineffective assistance of counsel on

appeal. Petitioner argues that his appellate counsel was ineffective for failing to have the transcript prepared from the pre-trial suppression hearing and for failing to raise as a point of error on appeal the claim that the burden of proof at the competency hearing was improperly allocated to Petitioner.

Standard of Review

The federal constitution guarantees a criminal defendant the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387,396 (1985). As with trial counsel, whether appellate counsel has been ineffective is determined by using the standard enunciated in *Strickland v. Washington*, under which a defendant must prove by a preponderance of the evidence both that counsel's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. In the context of appeals, the Constitution does not require an appellate attorney to advance every conceivable argument, and it can be effective assistance of counsel on appeal to focus on a few key issues. *Evitts v. Lucey*, 469 U.S. at 394; *Mayo v. Lynaugh*, 882 F.2d 134, 139 (5th Cir. 1989), *modified on other grounds*, 920 F.2d 251 (5th Cir. 1990).

Analysis

Petitioner first asserts that his appellate counsel was ineffective for failing to request a transcript of the pre-trial suppression hearing, which could then have been used both as support for his claim at trial that he did not knowingly and voluntarily make a written

statement about the murder and his current claim that the police did not honor the fact that he exercised his right to remain silent when his statement was taken.

This ground was not raised at the state level. Petitioner has not alleged, much less established that he meets the procedural requirements in order for this Court to consider an unexhausted claim on its merits. Accordingly, the claim is procedurally barred.

Moreover, even if it is considered on its merits, as permitted under § 2254(b)(2), it fails. Namely, Petitioner has failed to establish any prejudice. Under *Strickland*, Petitioner must show a reasonable probability that, but for his counsel's deficient representation, he would have prevailed on his appeal. *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001). With regard to his current claim that his right to remain silent was not "scrupulously honored," there was no objection made on this basis at trial. Thus, even had appellate counsel had a transcript of the pre-trial hearing *and* raised this issue on appeal, Petitioner has not shown that the Court of Criminal Appeals would have granted relief on a claim where error was not preserved at the trial level. Furthermore, this Court is not in possession of the record from the pre-trial suppression hearing, and it was not obtained during the state habeas process, either. Petitioner has therefore failed to adequately develop the factual basis of this claim. Without this record, this Court is left with the trial court's findings that Petitioner's statement was a knowing and voluntary one. There is therefore no factual support for Petitioner's claim that, had this record been obtained, there is a reasonable probability that he would have prevailed on appeal. This claim is without merit.

Petitioner also asserts that his appellate counsel was ineffective for failing to raise as an issue the allegedly incorrect burden of proof at the competency hearing. This Court has already determined that the burden of proof at the competency was correct under Texas state law. *See Manning v. State*, 730 S.W.2d 744, 748 n. 3. (Tex. Crim. App. 1987). Appellate counsel was not ineffective for failing to assert a meritless claim. This claim was denied at the state habeas level, and this decision was not contrary to federal law. It is recommended that Petitioner's sixth ground for relief be denied.

G. Testimony of Dr. James Grigson

In his seventh ground for relief, Petitioner argues that his rights under the Fifth and Fourteenth Amendments were violated because Dr. James Grigson testified at the guilt phase of the trial, giving his opinion that Petitioner was sane when he committed the murder, and testified at the punishment phase of the trial, giving his opinion that Petitioner is a future danger to society. Specifically, Petitioner asserts that his testimony violated his rights under *Miranda* because Petitioner's post-arrest silence was used against him at trial.

In *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the Supreme Court held that it was a violation of due process to use a criminal defendant's post-*Miranda* warnings silence as evidence of his sanity. In *Greenfield*, the defendant had entered an insanity plea, and the State had the burden under state law to prove that he was sane when he committed the sexual assault. The prosecutor used evidence of the defendant's refusal, shortly after the assault, to answer questions from police

officers before speaking to his attorney to help prove that the defendant was sane when he committed the offense. The Supreme Court held that this violated Greenfield's due process rights because *Miranda* rights carry with them an implicit promise that the exercise of those rights will not be penalized. *Id.* at 291-92. *Greenfield* was an extension of the rule announced in *Doyle v. Ohio*, 426 U.S. 610 (1976), in which the Supreme Court held that it violates a criminal defendant's due process rights to have his post-*Miranda*-warning silence to impeach him at trial.

The Fifth Circuit has stated that a witness' remarks constitute a comment on a defendant's silence if the actual intent was to comment on the sile4nce or if the character of the remark was such that the jury would so construe the remark. *United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir. 1992). The Supreme Court has also held that *Doyle* error raised at the federal habeas level is subject to the harmless error standard of whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Prior to Petitioner's trial, the trial court appointed psychiatrists James Grigson and Richard Schack to evaluate Petitioner in order to determine both his competence to stand trial and his sanity at the time of the murder. (Tr.:53-4).; The State called Grigson as a witness at trial. During the guilt portion of the trial, Grigson testified that he attempted to interview Petitioner pursuant to the court order. Grigson further testified that he was not able to examine Petitioner because Petitioner declined to speak to Grigson after Grigson read him his *Miranda* warnings. (R.IX:206).

Grigson further testified that Petitioner appeared to understand his rights and chose to take advantage of the right to refuse to speak to Grigson. (R.IX:206-7). Grigson later testified that, based on observing him for no more than five minutes in this initial meeting, observing him at the competency hearing, and reviewing Petitioner's records from Terrell State hospital, he did not believe that Petitioner suffered from any mental disease or defect that prevented him from knowing right from wrong. (R.IX:208).[7] Grigson also testified that when he observed Petitioner in his jail cell the first time his behavior was normal. (R.IX:208-9). Finally, at the punishment phase of the trial Grigson answered a hypothetical question posed by the prosecutor, based on facts from the trial. (R.IX:281-82).

Petitioner contends that Grigson's testimony regarding their initial meeting, as well as his testimony about Petitioner's demeanor at the subsequent competency hearing, violated the rule set forth in *Greenfield* because his post-*Miranda* warnings silence was used as evidence to prove both his sanity and his future dangerousness. Respondent asserts that Petitioner's constitutional rights were not violated because Grigson testified about his demeanor at the initial meeting, not his silence after receiving his *Miranda* warnings. Respondent further asserts that Grigson's testimony regarding Petitioner demeanor at the competency hearing does not violate *Greenfield*

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[7] During his testimony at trial, Grigson did not mention that the second time that he observed Petitioner was during the competency trial. Instead, Grigson stated generally that he was able to observe Petitioner for about an hour and a half in March of 1989, but never spoke to him at this point, either. (R.IX:207).

because his "silence" at the hearing was not induced by the reading of *Miranda* rights to him several months earlier.

This claim was denied at the state habeas level. The denial of this claim by the state court is not contrary to federal law. First, Grigson's testimony at the guilt phase of the trial regarding Petitioner's demeanor at the competency hearing cannot be considered testimony regarding post-*Miranda* warnings silence. Although Grigson did not testify specifically about whether he observed at the competency hearing, to the extent that he meant Petitioner's silence at this hearing, as opposed to the comments he made at the hearing, this silence that occurred several months later after the initial meeting in the context of a competency hearing was not induced by the *Miranda* warnings. Therefore, there was no *Greenfield* violation. Second, with regard to Grigson's testimony at the punishment phase of the trial, his testimony was based on a hypothetical question, not on either Petitioner's silence at their initial meeting or his silence during his competency hearing. Thus, this was also not a violation of *Greenfield.*

Finally, however, Grigson's testimony at the guilt phase of the trial regarding his initial meeting with Petitioner is a closer call. While Grigson testified about Petitioner's demeanor during this five minutes, he also testified that Petitioner was given his *Miranda* rights and specifically declined to speak to Grigson. Grigson then used his "demeanor" at this initial meeting, along with other evidence, to give his opinion that Petitioner was not insane when he committed the murder. But, even if this was a violation of the rule set forth in *Greenfield*, it was harmless error. In *Brecht v.*

Abrahamson, 507 U.S. 619, 623 (1993), the Supreme Court held that the standard for determining whether federal habeas relief must be granted in a case where there has been *Doyle* error is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. In *Brecht*, the Supreme Court held that the petitioner was not entitled to relief even though the State had referred to his post-*Miranda* warnings silence to impeach him because these references were only two pages of a 900-page trial transcript and because the State also made many permissible references to the petitioner's pre-*Miranda* silence to further impeach his exculpatory story. *Id.* 639.

Applying this standard to the case at hand, it cannot be said that Grigson's brief reference to Petitioner declining to speak to him at their first meeting had a substantial and injurious effect on the jury's verdict. The prosecutor never referred to this testimony in her closing statement. And, to support its position that Petitioner was sane when he committed the murder, the State also presented the testimony of Dr. Nguyen from Terrell State Hospital, who observed Petitioner for five days shortly before the murder and gave his opinion that Petitioner did not suffer from a mental disease or defect that prevented him from knowing right from wrong. (R.IX:238-39). Moreover, the brief statement about his initial meeting with Petitioner, which occurred months after the murder, was a small portion of Grigson's testimony and comprised only part of the basis for his opinion that Petitioner was sane when he committed the offense. Because the reference to Petitioner availing himself of the right to decline any interview with Dr.

Grigson was isolated and was never emphasized by the State, any error committed was harmless. It is therefore recommended that this ground for relief be denied.

H. Punishment Special Issues

In his eighth ground for relief, Petitioner asserts that the jury that decided his sentence was unable to either consider or give effect to his mitigating evidence of a mental illness through the special issues the jury was required to answer at the punishment phase of the trial. Petitioner further asserts that based upon the Supreme Court's opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its subsequent decisions further clarifying *Penry*, his death sentence should be set aside.

Because Petitioner committed capital murder prior to September of 1991, his jury was required to answer issues regarding whether the murder was committed deliberately, whether there was a probability that Petitioner would be a future danger to society, and whether the killing was unreasonable in response to any provocation from the victim. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(b) (Vernon 1981).[8] Petitioner cites *Penry*

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[8] The three questions that the jury was required to answer at Petitioner's trial were:

> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, that caused the death of the deceased, Vivian Moreno, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there probability that the defendant, Charles E. Mines, Jr. AKA Charles Anderson, would

v. Lynaugh, a Texas capital murder case, as support for his claim that the jury in his case was unable to consider the mitigating evidence he presented in answering these questions. The punishment special issues given to the jury at Penry's trial were the same as those given to the jury at Petitioner's trial. In *Penry*, the Supreme Court held that Penry's constitutional rights were violated because the jury in Penry's capital murder trial was unable to give any mitigating effect, through the punishment special issues as they existed at that time, to evidence presented by the defense that Penry was mentally retarded and suffered severe physical and emotional abuse as a child. The Supreme Court ruled that the jury was unable to give any mitigating effect to this evidence because a juror could have believed that Penry committed the murder deliberately and that he would be a future danger to society and also believed that he should not be executed because of his retardation and the abuse he suffered, but would have been unable to vote to spare his life. Indeed, the Supreme Court noted that Penry's evidence of mental retardation and severe childhood abuse was a "double-edged sword" because it mitigated his responsibility because he would be less able to control his behavior than an average person, but, because he could not learn from his mistakes due to his mental limitations, he posed a future danger

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> commit criminal acts of violence that would constitute a continuing threat to society?
>
> Was the conduct of the defendant Charles E. Mines, Jr. AKA Charles Anderson, in killing Vivian Moreno, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Tr. 114-15).

to society. 492 U.S. at 322-5.[9] Although at the time of Petitioner's trial the trial court was not statutorily required to submit a mitigation special instruction, Petitioner contends that such an instruction was constitutionally required because the jurors in his case, like the jurors in Penry's case, were unable to adequately consider the mitigating evidence that he presented at trial through their answers to the two special issues.

Subsequent to *Penry*, the Supreme Court has stated that a trial court's refusal to give an additional mitigating instruction does not constitute a constitutional error unless there is a reasonable probability that the jury applied the challenged instructions in a way that prevented the consideration of constitutionally relevant mitigating evidence. *Boyde v. California* , 494 U.S. 370, 382 (1990); *Johnson v. Texas*, 509 U.S. 350, 367-8 (1993). Moreover, the Supreme Court has specifically stated that a state may shape and structure the jury's consideration of evidence at the

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[9] After Penry was handed down by the Supreme Court, and after Mines' trial, Article 37.071 of the Texas Code of Criminal Procedure was amended, the deliberateness special issue was deleted, and a mitigation special issue was added. The mitigation special issue that has been added to Article 37.071 reads as follows:

> Whether taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.07(e) (Vernon Supp. 1999)

punishment phase of a capital murder trial, so long as it does not preclude the jury from giving effect to any relevant evidence. *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998).

In *Maldon v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994), the Fifth Circuit outlined the analysis that should be done for evaluating *Penry* claims such as the one Petitioner makes. First, for a petitioner to be entitled to relief on a claim that the jury was unable to consider mitigating evidence, the mitigating evidence must be constitutionally relevant and second, it must have been beyond the effective reach of the jurors. Mitigating evidence is constitutionally relevant in a *Penry* claim where a defendant has shown that he has a uniquely severe permanent handicap through no fault of his own and that the criminal act was attributable to this severe permanent condition. *Boyd v. Johnson*, 167, F.3d 907, 911-2 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999). Recently, in *Robertson v. Cockrell*, 2003 WL 1204119 (5th Cir. March 21, 2003), the Fifth Circuit recognized that it views *Penry* claims in order to determine whether the evidence in question constitutes an involuntary disability, which is both permanent and severe, and from which the criminal acts were a consequence. Only if all four factors are present has the Fifth Circuit held that an additional mitigating evidence special issue required in order to allow the jury to give full effect to the proffered mitigating evidence. *Robertson*, slip op. at 6-7. Thus, for Petitioner to be entitled to relief on this claim, he must establish both that there was evidence presented at his trial that he was a uniquely severe permanent handicap and that the murder was

attributable to this condition as well as that the jury was unable to consider this evidence through two special issues given to them.

At the guilt phase of the trial, Petitioner presented evidence through the testimony of Dr. Schack that he suffers from bipolar disorder, a mental illness that is characterized by irrational thinking, impulsive behavior, grandiose thinking, impaired judgment, possible violent and dangerous behavior, paranoia, and poor judgment. (R. IX: 16y2-66). Dr. Schack then gave his opinion that, because of his mental illness, Petitioner was not capable of knowing right from wrong on the day of the murder. (R. IX:169). At the punishment phase of the trial, however, Schack further testified that bipolar disorder is a treatable disease through the use of hospitalization and medications. He also testified that, without treatment, Petitioner had a high probability of committing future acts of violence, but that through treatment the odds of him committing future acts of violence would be reduced. (R. IX:284-88). In his closing statement at the punishment phase of the trial, Petitioner's attorney argued that Petitioner could not have deliberately killed the victim because of his mental illness and that he would not be a future danger because his illness was treatable. (R. IX:303-310).

The Fifth Circuit has previously held that evidence of a mental illness, such as schizophrenia, that can be controlled by treatment is mitigating evidence that can be considered by a jury within the context of the future dangerousness special issue. *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir. 1998); *Robison v. Johnson*, 151 F.3d 256, 269 (5th Cir. 1998) (on rehearing). At his trial, Petitioner not only presented evidence that his mental

illness is treatable and when treated would lower any future potential for violence, but defense counsel specifically argued that this evidence established that Petitioner would not constitute a future danger to society. On direct appeal and again on remand from the Supreme Court the Court of Criminal Appeals ruled that Petitioner's mitigating evidence of a mental illness could be adequately considered through the first two special issues that the jury was required to answer. *Mines v. State*, 888 S.W.2d 817-18 (Tex. Crim. App. 1994) *cert. denied*, 514 U.S.1117 (1994); *Mines v. State*, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992). These decisions are not an unreasonable application of federal law. It is recommended that Petitioner's eighth ground for relief b e denied.

I. Jury Composition

In his ninth ground for relief, Petitioner argues that his constitutional rights under the Sixth and Fourteenth Amendments were violated because his jury was chosen from a venire in which African-Americans were statistically underrepresented. Specifically, Petitioner asserts that, because there were only three African-Americans, in the eighty people in the venire from which his jury was chosen, 3.75% of the venire, and census date from 1990 show that ten percent of the population of Ellis County was African-American at that time, African-Americans were unconstitutionally underrepresented in his venire. Accordingly, Petitioner argues that his Sixth Amendment right to a jury drawn from a fair cross-section of community and his Fourteenth Amendment equal protection rights were violated.

The Supreme Court has held that the Sixth Amendment right to a jury trial requires that the jury be selected from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528-29 (1975). Therefore jury venires must not systemically exclude distinctive groups in the community. *Duren v. Missouri*, 439 U.S. 357- 363-64 (1979). In order to establish a *prima facie* Sixth Amendment fair cross-section violation, one must show that: 1) the group was alleged to have been excluded is a distinctive group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of this group in the community; and 3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Id.* At 364. However, the Supreme Court has noted that the Sixth Amendment does not require petit juries, as opposed to panels or venires, to reflect the composition of the community at large. *Lockhart v. McCree,*476 U.. 162, 173 (1986).

The Supreme Court has also held that the Equal Protection clause of the Fourteenth Amendment prohibits a criminal defendant from being tried by a petit jury from which all members of his race, solely because of their race, have been excluded. *Hernandez v. Texas*, 347 U.S. 475, 477 (1954). Likewise, it is a violation of the equal protection clause for a group to be substantially underrepresented as jurors, if this underrepresentation results from purposeful discrimination. *Castaneda v. Partida*, 430 U.S. 482, 493 (1977). In order to establish such an equal protection violation, a defendant must show that the procedure employed resulted in the substantial underrepresentation of his race. *Id.* At 494. A *prima*

facie violation is established when it is shown that a recognizable, distinct group has been underrepresented. This "rule of exclusion" is shown by comparing the proportion of the group in the general population with the proportion called for jury service over an extended period of time. *Castaneda v. Partida*, 430 U.S. at 494-95; *Hernandez*, 347 U.S. at 480-81. Finally, a selection procedure that is susceptible of abuse or is not racially neutral supports a presumption of discrimination raised by a statistical showing of underrepresentation. *Partida*, 430 U.S. at 494.

Petitioner has failed to establish either a *prima facie* Sixth Amendment violation or a Fourteenth Amendment violation. While the Fifth Circuit has recognized that African-Americans are a distinctive group in the community, *McGinnis v. Johnson,* 181 F.3d 686, 690 (5th Cir. 1999), Petitioner has failed to meet the other requirements of a *prima facie* violation of either the Sixth or Fourteenth Amendment. In particular, Petitioner has, both at the state habeas level and here, presented evidence of the number of African-Americans in the venire from which his jury was chosen relative to the number of African-Americans in the community. He has not, however, presented any evidence that African-Americans had been underrepresented over a period of time within the group of people called for jury service. One case of alleged underrepresentation is not sufficient evidence to establish, under the *prima facie* tests, general underrepresentation of a distinctive group from jury venires. *Timmel v. Phillips,* 799 F.2d 1083, 1086 (5th Cir. 1986). Moreover, Petitioner has failed to establish either any systematic exclusion of African-Americans from jury venires in Ellis County or that the procedure used to select people for jury service was

susceptible to abuse and/or not race neutral. *See Alexander v. Louisiana,* 405 U.S. 625, 630 (1972) (holding that Alexander had made a *prima facie* case of discrimination under the Fourteenth Amendment in the method used for choosing the grand jury that indicted Alexander where there was statistical evidence of the systematic exclusion of African-Americans from grand jury panel *and* the selection procedure itself was not racially neutral). At the time of Petitioner's trial, jurors were chosen fro the current voter registration list from a particular county, updated annually. *See* TEX. GOV'T CODE ANN. § 62.001 (Vernon Supp. 1988). Petitioner has not shown that a jury venire taken from the current voter registration list of Ellis County is either a systematic exclusion of African-Americans or is a system susceptible of abuse, let alone that it is somehow not a race neutral manner of calling citizens for jury service.

This ground for relief was denied at the state habeas level. That decision is not contrary to clearly established federal law. It is therefore recommended that this ground be denied.

J. Texas' Capital Sentencing Statute

In his tenth ground for relief, Petitioner asserts that Texas' capital sentencing statute violates the Fifth, Eighth, and Fourteenth Amendments because the sentencing jury is allowed unbridled discretion in assessing punishment without the proper consideration of mitigating evidence necessary to fulfill the constitutional requirement of individualized sentencing. Petitioner further contends that the Court of Criminal Appeals has failed to adhere to any guidelines in weighing punishment evidence on direct appeal. As

support for this argument, Petitioner cites Justice Blackmun's dissent in *Callins v. Collins,* 510 U.S. 1141 (1994), and argues that this Court should vacate his death sentence and hold that the Constitution "prohibits the imposition of the death penalty until either the Texas Legislature or the Court of Criminal Appeals designs a scheme capable of eliminating the sentencer's unbridled discretion to inflict death while simultaneously permitting unrestricted consideration of mitigating evidence." (Petition at 90).

Contrary to Petitioner's argument, in *Jurek v. Texas,* 428 U.S. 262 (1976), the Supreme Court upheld the version of the Texas death penalty statute under which Petitioner was tried. Thus, the Supreme Court has specifically ruled that the manner in which Texas narrows the class of murderers eligible for the death penalty passes constitutional muster by eliminating arbitrariness in the determination of who is eligible to receive the death penalty.

With regard to Petitioner's allegation that the Texas death penalty scheme fails to allow adequate discretion in considering mitigating evidence, the Supreme Court noted in *Tuilaepa v. California,* 512 U.S. 967, 974 (1994) that, "[i]n providing for individualized sentencing, it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion." Moreover, citing *Zant v. Stephens,* 462 U.S. 862, 875 (1983), the Court in *Tuilaepa* specifically stated that a sentencer may be given unbridled discretion in determining whether to impose the death penalty once it is determined that the defendant is a member of the class that is eligible to receive the death penalty. *Tuilaepa,* 512 U.S. at 979-

980. These cases illustrate the requirement that, so long as the class of murder defendants is sufficiently tailored to avoid arbitrariness and a state provides a vehicle that is sufficient for the jury to consider all relevant punishment evidence, both aggravating and mitigating, a state capital sentencing statute will be considered constitutional.

With respect to the special issues given to the jury to answer in Petitioner's case, in *Jurek* the Supreme Court approved of the Texas future dangerousness issue and has continued to do so in subsequent cases. *See Pulley v. Harris,* 465 U.S. 37, 50-1 (1984). And, although in *Penry v. Texas,* 429 U.S. 302, 324-5 (1989), the Supreme Court held that certain mitigating evidence could not be adequately considered within the scope of the future dangerousness issue that the jury in Petitioner's trial received, as noted earlier, the Fifth Circuit has specifically held that mitigating evidence of the type that Petitioner introduced at trial can be fully considered with the special issues that the jury at his trial was required to answer. Thus, through various decisions, the Supreme Court has held that the Texas statute that establishes the subset of murderers eligible for the death penalty is constitutional and that the future dangerousness punishment special issue is a constitutionally adequate vehicle for juries to consider aggravating and most mitigating evidence. And, the Fifth Circuit has held that the type of mitigating evidence offered by Petitioner can be adequately considered within the context of the special issues answered by the jury at Petitioner's trial.

Finally, to the extent that Petitioner suggests that the constitution requires that the Court of Criminal Appeals weigh aggravating and mitigating evidence on appeal in order to determine whether a death sentence is warranted, the Supreme Court has held that the Constitution does not require any appellate proportionality review of a death sentence (either with other cases in which the defendants received the death penalty or with cases in which defendants did not receive the death penalty) where the statutory procedure adequately channels the sentencer's discretion. And, as noted earlier, the Supreme Court has specifically stated that Texas has a statutory scheme that adequately channels the sentencer's discretion. *See McCleskey v. Kemp,* 481 U.S. 279, 306-7 (1987); *Pulley v. Harris,* 465 U.S. at 50-1.

Moreover, in *Hughes v. Johnson,* 191 F.3d 607 (5th Cir. 1999), *cert. denied,* 528 U.S. 1145 (2000), the Fifth Circuit applied *Pulley v. Harris* in a case in which the petitioner argued that the Fourth and Eighth Amendments required that the mitigating evidence in his case be examined "independently" on appeal in order to determine whether or not the petitioner was death-worthy. The Fifth Circuit rejected this argument, stating that Hughes's argument was an argument, in essence, for a proportionality review of his case as compared to other death penalty cases, because implicit in his argument was that other death penalty defendants did not have the same amount or type of mitigating evidence as he did. The Fifth Circuit therefore held that, pursuant to *Pulley v. Harris*, an independent appellate review of mitigating evidence was not constitutionally required. *Hughes*, 191 F.3d at 621-3.

This grounds was denied at the state habeas level. This decision is not contrary to clearly established federal law. Accordingly, it is recommended that Petitioner's death penalty ground for relief be denied.

K. Cumulative Error

Finally, in his eleventh round for relief, Petitioner asserts that, even if he is not entitled to relief on any of his other claims individually, he is entitled to relief when his grounds for relief are considered cumulatively. Petitioner further contends that constitutional errors permeated his trial and appeal such that he was deprived of the "fundamental fairness guaranteed by the Fifth and Fourteenth Amendments."

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992), the Fifth Circuit held that in order for a federal habeas petitioner to prevail on a claim of cumulative error at a state trial, he must establish that: 1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; 2) errors were not procedurally defaulted for habeas purposes; and 3) the constitutional errors so infected entire trial that the resulting conviction violates due process. *Id.* At 1458.

Although Petitioner has alleged numerous constitutional violations, most of which have not been procedurally defaulted, aside from stating that these alleged violations deprived him of "fundamental fairness," Petitioner makes no argument that these alleged errors in their cumulative effect resulted in a verdict and/or sentence that violates due process. (Petition at 90-1). None of Petitioner's claims, either individually or aggregately, indicate that his trial was so

infected with constitutional errors that the resulting conviction is suspect or violates due process. Rather, Petitioner's conviction for capital murder was based on admissible and credible evidence, and he was represented by competent counsel at all stages of the trial. Petitioner's eleventh ground for relief is without merit, and he is not entitled to relief on this basis. Accordingly, it is recommended that is be denied.

RECOMMENDATION

Petitioner's first ground for relief should be DISMISSED without prejudice in order for Petitioner to exhaust his state court remedies. With regard to his remaining grounds for relief, Petitioner has failed to make a substantial showing of the denial of a federal right. The state court adjudication on the merits neither resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Petitioner's remaining ten grounds for relief should be DENIED.

Signed this 21st day of May, 2003.

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must serve and file written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S. Ct. 466, 472 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

FILED: August 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES E. MINES, JR	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-00-CV-2044-H
	§	
JANIE COCKRELL,	§	
DIRECTOR OF THE TEXAS	§	
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONS DIVISION,	§	
Respondent.	§	

ORDER

Before the Court are the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed May 21, 2003; Respondent's Objections, filed June 6, 2003; and Petitioner's Objections, filed July 24, 2003.

The Court has made the required independent review of the pleadings, files, and records in this case; the Findings and Conclusions of the Magistrate Judge; and the objections referred to above. Having done so, the

Court is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are **ADOPTED** as the Findings and Conclusions of the Court, and the Objections are **OVERRULED**.

Judgment will be entered accordingly.

SO ORDERED.

DATED: August 6th, 2003

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED: August 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES E. MINES, JR Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-00-CV-2044-H
	§	
JANIE COCKRELL, DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONS DIVISION, Respondent.	§ § § § § §	

JUDGMENT

This Judgment is entered pursuant to the Court's Order dated August 6th, 2003.

IT IS ORDERED, ADJUDGED and DECREED by the Court that the Petition for Writ of Habeas Corpus be, and it is hereby, DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this Judgment and the Order

adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge to counsel for the parties.

SIGNED this 6th day of August, 2003.

/s/ Barefoot Sanders
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS